83-1952 (3)

Office - Supreme Court, U.S.
FILED
25
MAY 23 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

PAN AMERICAN WORLD AIRWAYS, INC.

Appellant,

v.

GEORGE PUCHERT

Appellee.

JURISDICTIONAL STATEMENT

BARRY W. MARR
JAMES H. HERSHEY
Carlsmith, Carlsmith,
Wichman and Case
2200 Pacific Tower
Bishop Square
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-2500

RICHARD SCHOOLMAN
200 Park Avenue, 47th Floor
New York, New York 10166
Telephone: (212) 880-1112

Counsel for Appellant
Pan American World
Airways, Inc.

100 pp

QUESTIONS PRESENTED

1. Whether a complaint against an airline subject to the Railway Labor Act alleging an unlawful discharge of an employee covered by a collective bargaining agreement constitutes a "minor dispute" subject to mandatory arbitration provisions of the Railway Labor Act.

2. Whether a state court has jurisdiction to enforce a state statute which would regulate the discharge of an employee covered by a collective bargaining agreement between a union and an airline where the claim is a "minor dispute" and subject to mandatory arbitration under the Railway Labor Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i.
TABLE OF AUTHORITIES	iv.
OPINIONS BELOW	x.
JURISDICTION	xi.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	xiii.
STATEMENT OF THE CASE	1
A. Procedural History	2
B. Statement of the Facts . .	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	7
I. THE HAWAII SUPREME COURT'S DECISION CREATESTHE POTENTIAL FOR CHAOS IN THE LABOR RELATIONS OF COMMON CARRIERS	7
A. The Legislative History of the Railway Labor Act Expresses a Congressional Intent for Mandatory Arbitration of Minor Disputes	10

Page

B. The Discharge of an Employee Subject to a Collective Bargaining Agreement Is a Minor Dispute and Is Subject to Mandatory Arbitration Under the Railway Labor Act 18

C. State Courts are Without Jurisdiction to Interfere in Areas of Exclusive Federal Regulations 23

D. The Hawaii Supreme Court Erroneously Applied Narrow Exceptions to Preemption Under the National Labor Regulations Act to the Railway Labor Act 34

E. This Court Has Recognized No Exception to the Mandatory Preemption of Minor Disputes Under the Railway Labor Act 39

II. CONCLUSION 44

TABLE OF AUTHORITIES

Cases:	Page
Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. 1980)	37
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973)	37
Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972)	17, 19, 23, 24, 25, 29, 30, 29 44
Baltimore Typographical Union No. 12 (A.S. Abell Co.) 201 N.L.R.B. 120 (1973)	34
Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1980)	37
Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947)	26
Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30 (1957)	17
Choate v. Louisville & Nashville R.R. Co., 715 F.2d 369 (7th Cir. 1983)	20

	Page
City of Burbank v. Lockheed Air Terminal, Inc. 411 U.S. 624 (1973)	26, 30
Columbia Typographical Union No. 101 (Washington Post Co.) 207 N.L.R.B. 831 (1973)	34
Dorsey v. Chesapeake & Ohio Railway Co., 476 F.2d 243 (4th Cir. 1973)	20
Douglas v. Seacoast Prod., Inc., 431 U.S. 265 (1977) . . .	30
Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711 (1944)	14, 18
Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977)	37, 39 40
Felter v. Southern Pacific Co., 359 U.S. 325 (1959)	10
Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982)	27
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	26
Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824)	25, 26
Gunther v. San Diego & A.E.R. Co., 382 U.S. 257 (1965)	20

	Page
Harris v. Norfolk & Western Railway Co., 616 F.2d 377 (8th Cir. 1980)	37
Hines v. Davidowitz, 312 U.S. 52 (1941)	26, 28
Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983)	20
Johnson v. American Airlines, Inc., 487 F. Supp. 1343 (N.D. Tex. 1980)	37
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	27, 30
Joseph T. Ryerson, 199 N.L.R.B. 461 (1972)	34
Kaschak v. Consolidated Rail Corp., 707 F.2d 902 (6th Cir. 1983)	20
Landfried v. Terminal R.R. Ass'n. of St. Louis, 721 F.2d 254 (8th Cir. 1982)	20
Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930 (1978)	20
Mailers Union No. 36 (Houston Chronical), 199 N.L.R.B. 804 (1972)	34

	Page
Moore v. Illinois Central Railroad Co., 312 U.S.630 (1941)	19, 39
Mountain State Construction, 203 N.L.R.B. 1085 (1973)	34
Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926) .	26
New York Telephone Co. v. New York State Labor Dept., 440 U.S. 519 (1979)	37, 38 39, 40
North Shore Publishing, 206 N.L.R.B. 42 (1973)	34
Puchert v. Agsalud, No. 8908, Slip Op. (Hawaii January 27, 1984)	x, 23
Radar v. United Transportation Union, 718 F.2d 1012 (11th Cir. 1983)	20
Railway Labor Executives Association v. Atchison, T. & S.F. Railroad Co., 430 F.2d 994 (9th Cir. 1970), cert. denied, 400 U.S. 1021 (1971)	20
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)	30
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1955)	33

	Page
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	37, 38
Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir. 1983)	20
Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978)	37, 39, 40
Silkwood v. Kerr-McGee Corp., 464 U.S. ___, 104 S. Ct. 615 (1984)	27
Stanton v. Delta Airlines, Inc., 669 F.2d 833 (1st Cir. 1982) . .	20
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	32
United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	31, 32
United Technologies Corporation, 115 L.R.R.M 1049 (1984)	34
CONSTITUTIONAL PROVISIONS:	
United States Constitution, Article VI, § 2	xiii, 25

Page

STATUTES:

Hawaii Revised Statute, §§ 378-31 et seq. . . . . Passim

Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. 36

Age Discrimination Act, 29 U.S.C. §§ 621 et seq. 37

National Labor Relations Act, 29 U.S.C. §§ 151 et seq. . . . Passim

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. . . . 46

Railway Labor Act, 45 U.S.C §§ 151 et seq. . . . . Passim

Employees' Retirement Insurance Security Act, 29 U.S.C. §§ 1001 et seq. 46

MISCELLANEOUS:

Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio State L.J. 277 (1980). 40

L. Tribe, American Constitutional Law, 378 (1978) 28

Report of the House of Representatives Committee on Interstate and Foreign Commerce HR Rep. No. 1944, 73D Cong., 2d, Sess. 3 15

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Hawaii Supreme Court in Puchert v. Agsalud, No. 8908, Slip. Op. (Hawaii January 27, 1984), from which this appeal is taken, is reprinted as Appendix A.* The Hawaii Supreme Court decision reversed a judgment of the Circuit Court of the First Circuit, State of Hawaii, dated June 22, 1982. There is no reported decision from the circuit court. The circuit court's judgment affirmed a decision of the Director of the Department of Labor and Industrial Relations of the State of Hawaii.

* The appendices to the Jurisdiction Statement are bound in a separate volume.

JURISDICTION

The Appellee filed a complaint with the Hawaii Department of Labor and Industrial Relations seeking relief for an alleged unlawful discharge. The Director of the Department of Labor and Industrial Relations dismissed the complaint as untimely filed. The Circuit Court for the First Circuit, State of Hawaii, affirmed the Director's decision. On appeal the Hawaii Supreme Court reversed the lower court holding, inter alia, that the termination was not a "minor dispute" and that the Hawaii Revised Statute § 378-32 was not preempted by the Railway Labor Act, 45 U.S.C. §§ 151 et seq. See Appendix A. Appellants filed a timely Notice of Appeal to this Court in the Hawaii Supreme Court on April 18, 1984. See Appendix B. The time for docketing this appeal was extended to and including May 25, 1984, by Justice Rehnquist

in an order dated April 20, 1984. See Appendix C.

Because the Hawaii Supreme Court held that Hawaii Revised Statute § 378-32 was not, under the circumstances of this case, preempted by the Railway Labor Act, 45 U.S.C. §§ 151 et seq., this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).*

* Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Pan American World Airways, Inc. states that its only subsidiary is Pan American World Services, Inc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Section 2 of the United States Constitution provides in relevant part that

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in Every State shall be bound thereby, any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding.

The Hawaii Revised Statutes, §§ 378-31 et seq. are reprinted in full as Appendix D. The relevant sections of the Railway Labor Act, 45 U.S.C. §§ 151 et seq. are reprinted in Appendix E. The relevant sections of the National Labor Relation Act are reprinted in Appendix F.

STATEMENT OF THE CASE

The issue in this case is whether a state court may avoid preemption and usurp an area of exclusive federal regulation by asserting jurisdiction over an employment termination matter which is subject to mandatory arbitration under the Railway Labor Act. The Hawaii Supreme Court held that the state statute, as applied, was not preempted by the Railway Labor Act because the claim was based upon the state statute and not the collective bargaining agreement between Pan American World Airways, Inc. ("Pan Am") and the Transport Workers Union of America ("TWU"). This decision is in direct conflict with the decisions of this Court and the express terms of the Railway Labor Act. If this decision is permitted to stand, it will undercut the well established federal labor policy mandating arbitration as the exclusive means of

resolving minor disputes under the Railway Labor Act.

A. Procedural History

On January 14, 1979, TWU filed a grievance, pursuant to its collective bargaining agreement with Pan Am, for George K. Puchert ("Puchert") with respect to his termination five days earlier. The grievance was brought before the Board of Adjustments which modified the termination to a six months medical leave.

Thereafter, Puchert filed a complaint on June 1, 1979, pursuant to Hawaii Revised Statutes ("HRS") §§ 378-31, et seq., against Pan Am for an alleged unlawful discharge. The complaint was filed with the Enforcement Division of the Department of Labor and Industrial Relations ("DLIR") for the State of Hawaii. Subsequently, on or about August 7, 1979, Puchert was notified of his termination by Pan Am for failing to comply with the

terms of his medical leave as set by the Adjustment Board.

In June, 1980, the DLIR conducted hearings on Puchert's claim. The hearing officer recommended that the complaint be dismissed for lack of jurisdiction due to the untimely filing. The Director of the DLIR concurred with the hearing officer's recommendation and Puchert appealed their decision to the Circuit Court for the First Circuit, State of Hawaii.

The circuit court affirmed the dismissal of Puchert's complaint because it was untimely filed. Judgment was so entered on June 22, 1982, and Puchert appealed to the Hawaii Supreme Court.

The Hawaii Supreme Court reversed the lower court's decision and, inter alia, held that the claim was not a minor dispute and that HRS § 378-32 was not preempted by the Railway Labor Act. Judgment was entered

on January 27, 1984, and a Notice of Appeal filed on April 18, 1984. By order dated April 20, 1984, the time for docketing this appeal was extended to and including May 25, 1984.

B. Statement of the Facts

Pan Am is an air carrier engaged in interstate commerce and subject to the provisions of the Railway Labor Act. Puchert was for several years prior to August 7, 1979 employed by Pan Am as a port steward. Puchert is represented for purposes of collective bargaining by the TWU. The TWU has had a collective bargaining agreement with Pan Am at all times relevant to this action. See Appendix G. The agreement, by its terms, is established under the Railway Labor Act. Appendix G, Art. 1. It expressly recognizes that the Union is the representative of the port stewards. Appendix G, Art. 2. The contract governs termination of the employees,

discipline, discharge, and the resolution of grievances. Appendix G, Arts. 13, 21, 22 and 23.

Puchert allegedly suffered a back injury on December 30, 1978, and did not return to work until January 6, 1979. On January 9, 1979, Pan Am discharged Puchert because he could no longer perform the essential requirements of his position.

On January 14, 1979, the TWU filed a grievance with Pan Am on Puchert's behalf pursuant to the collective bargaining agreement between Pan Am and TWU. The grievance was brought before the Board of Adjustment ("Board") for mandatory arbitration on February 7, 1979. The Board modified Puchert's dismissal to a medical leave of absence not to exceed six months. The Board also required Puchert to obtain a medical report from a doctor approved by Pan Am's

insurer and to qualify for a permanent disability rating from the DLIR Workers Compensation Division that would not restrict him from performing his duties as a port steward.

When Puchert filed his complaint with the Hawaii DLIR on June 1, 1979, alleging that he had been terminated because of a work injury, he was still a member of the TWU and still on medical leave pursuant to the award of the Adjustment Board. Puchert had utilized the grievance procedure of the collective bargaining agreement after his termination in January of 1979, and could have availed himself of that same grievance procedure in August 1979 to contest his termination. Rather, Puchert filed the complaint with the DLIR based upon a state statute which prohibits termination from employment where the sole reason is because the employee suffered a work injury. HRS § 378-32(2).

The DLIR dismissed Puchert's complaint on the grounds that it was not timely filed during the thirty days following his discharge on August 7, 1979. HRS § 378-33. On appeal the Circuit Court affirmed the DLIR decision. However, the Hawaii Supreme Court reversed the lower court and remanded the case to the DLIR for a hearing on the merits. The Hawaii Supreme Court's decision that state jurisdiction was not preempted by the Railway Labor Act is the basis for this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE HAWAII SUPREME COURT'S DECISION CREATES THE POTENTIAL FOR CHAOS IN THE LABOR RELATIONS OF COMMON CARRIERS

This appeal presents substantial questions regarding a state court's jurisdiction to interfere with the express federal policy of the Railway Labor Act that the

exclusive forum for the resolution of minor disputes is the Board of Adjustment. The Hawaii Supreme Court, by characterizing Puchert's claim as an unlawful discharge rather than as a minor dispute under the collective bargaining agreement, has directed that the claim be resolved under state law. The resolution of this claim under state law infringes upon the exclusive jurisdiction granted to the Boards of Adjustment under the Railway Labor Act.

The history of the Railway Labor Act evidences an intent on the part of Congress to regulate both comprehensively and exclusively the resolution of minor disputes in the interest of protecting the free flow of interstate commerce. A critical concern of Congress in protecting interstate commerce through the regulation of rail and air carriers was the avoidance of strikes growing out of unresolved disputes. Of particular concern

was the resolution of "minor disputes" before they developed into "major disputes" resulting in a strike and the consequent disruption of commerce. Accordingly, federal law mandates that any minor disputes relating to issues covered by a collective bargaining agreement under the Railway Labor Act be exclusively referred to arbitration by Boards of Adjustment. Neither state nor federal courts have jurisdiction to entertain claims relating to or arising out of collective bargaining agreements under the Railway Labor Act. To permit a state to regulate these disputes would impermissibly interfere with the exclusive dispute resolution mechanism established by Congress.

This Court has consistently held that only Congress, through a clear statutory enactment, can alter the express mandate for arbitration of minor disputes. There is no congressional exception in the instant case.

The Hawaii statute is preempted with respect to minor disputes arising under a collective bargaining agreement governed by the Railway Labor Act.

A. The Legislative History of the Railway Labor Act Expresses A Congressional Intent for Mandatory Arbitration of Minor Disputes

The purposes of the Railway Labor Act, originally enacted in 1926 and substantially revised in 1934, are, inter alia, to secure uninterrupted operations by carriers such as Pan Am, to protect the associational rights of the employees of such carriers, and to promote speedy settlement of labor disputes between the employees and the carriers. 45 U.S.C. § 151a. See Felter v. Southern Pacific Co., 359 U.S. 325, 326, n.1 (1959).

The pertinent provisions of the Railway Labor Act which are applicable in

this case, and set forth in full in Appendix E, provide in essence as follows:

§ 151a. General purposes

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a.

§ 153. National Railroad Adjustment Board--Establishment; composition; powers and duties;divisions; hearings and awards; judicial review

> First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided--
>
> . . . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designed to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

. . . .

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

45 U.S.C. § 153.

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances,

> or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 to 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

45 U.S.C. § 184.

The legislative history of the Railway Labor Act reenforces the interpretation of statutory language that minor disputes must be sent to adjustment boards for

resolution[1] and not to be adjudicated in state courts. The distinction between "major disputes" and "minor disputes" is discussed in greater detail infra. Briefly, however, "minor disputes" are those which arise out of or concern the interpretation of collective bargaining agreements or other incidents of a union-represented employee's employment relationship (such as claims for personal injury) even if such matters are not covered by the agreements. Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 722-723 (1944).

The 1926 version of the Railway Labor Act[2] called upon carriers and their

---

[1]The submission of such disputes to the Adjustment Boards for resolution has often been referred to as "arbitration." However, the procedure under the Railway Labor Act is not strictly "arbitration" in the sense that term is used in other contexts, but rather a mandatory procedure for resolution of such disputes by the Adjustment Board.

[2]44 Stat. 577.

employees to voluntarily agree to the formation of Boards of Adjustment for the resolution of minor disputes. If this step was unsuccessful then these disputes, along with major disputes, became a function of the Board of Mediation, the predecessor of the National Mediation Board.

The lack of compulsion to established boards of adjustment was a major weakness in handling minor disputes. This was evident from the legislative history for the 1934 amendments: "In many instances . . . the carriers and employees have been unable to reach agreements to establish such boards [of adjustment]."[3]

Minor disputes that did reach such boards often remained unresolved because the

---

[3]Report of the House of Representatives Committee on Interstate and Foreign Commerce, HR Rep. No. 1944, 73D Cong., 2d, Sess. 3.

boards deadlocked and were unable to reach a majority decision.[4] These factors failed to achieve Congress' expressed legislative purpose of settling all disputes arising out of the interpretation of collective bargaining agreements. Section 2, First.[5]

Amendments were proposed to the Railway Labor Act in 1934 which addressed these problems. One such amendment established the National Railroad Adjustment Board.[6] This eliminated several procedural deficiencies of the prior statute. The most important change made by the 1934 amendments was to eliminate the discretion of the parties in submitting minor disputes to the adjustment board. Under the amended statute, submission of minor disputes to the adjustment board became mandatory, and

---

[4] Ibid.

[5] 44 Stat. 577-578.

[6] Section 3, First, 45 USC § 153, First.

the decision of the Adjustment Board is conclusive.[7]

This Court has examined the mandatory resolution of minor disputes by the adjustment board and concluded that Congress intended that all such disputes be resolved by the Board of Adjustment. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co. 353 U.S. 30, 39 (1957).

The issue before the Court today is not one of statutory interpretation. The requirement for mandatory resolution ("arbitration") by the Adjustment Board under the Railway Labor Act was decided by this Court in Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). All minor

---

[7]Not only is the award of the Adjustment Board conclusive, but review may be taken only to the United States District Court and such review is limited by the statute. 45 U.S.C. § 153(q).

disputes are to be resolved by the adjustment boards and neither state nor federal courts have jurisdiction to hear such claims. 406 U.S. at 322-325. Rather, this appeal raises two issues for review. First, whether the underlying claim herein is a minor dispute? And, if so, if there is any exception which would permit a state court to exercise jurisdiction over that claim pursuant to a state statute?

B. The Discharge of an Employee Subject to a Collective Bargaining Agreement Is a Minor Dispute and Is Subject to Mandatory Arbitration Under the Railway Labor Act

The distinction between major and minor disputes was explained in this Court's decision in Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711 (1944). Elgin distinguished disputes over grievances, which are "minor," and disputes arising out of collective bargaining, which are "major."

325 U.S. at 722. Minor disputes contemplate the existence of a collective bargaining agreement rather than any effort to establish such an agreement or to modify an existing agreement. A minor dispute relates to either the meaning or proper application of a particular provision within that agreement in the context of a specific situation, including an individual's employment-related dispute not covered by the collective bargain agreement so long as such disputes are not "major disputes," which concern the creation of the agreement. 325 U.S. at 723.

In Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972), this Court overruled Moore v. Illinois Central Railroad Co., 312 U.S. 630 (1941). Andrews held that minor disputes, such as claims for a wrongful discharge, were subject to mandatory submission to a board of adjustment. The decision noted that:

> The notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

406 U.S. at 322. A claimant is limited to judicial review of the board's proceedings as provided for in the Act. Gunther v. San Diego & A.E.R. Co., 382 U.S. 257 (1965). Since the Andrews case, lower federal courts have repeatedly recognized they lack jurisdiction to pass on minor disputes under the Railway Labor Act.[8] For example, an association of employees sought to recover damages for loss

---

[8] See e.g., Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 905 (6th Cir. 1983); Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1054-1055 (7th Cir. 1983); Choate v. Louisville & Nashville R.R. Co., 715 F.2d 369, 370 (7th Cir. 1983); Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 191 (9th Cir. 1983); Radar v. United Transportation Union, 718 F.2d 1012, 1014, (11th Cir. 1983); Stanton v. Delta Airlines, Inc., 669 F.2d 833, 836 (1st Cir. 1982); and Landfried v. Terminal R.R. Ass'n. of St. Louis, 721 F.2d 254, 255 (8th Cir. 1982) to cite but a few.

of work under a breach of contract or tort rationale basis in Railway Labor Executives Association v. Atchison, T. & S.F. Railroad Co., 430 F.2d 994 (9th Cir. 1970), cert. denied, 400 U.S. 1021 (1971). This effort was rebuffed, the court holding:

> Where, as here, the dispute grows out of the employment relationship and, in the final analysis, involves an attempt to impose a right which is incident to that relationship, the statutory forum is the adjustment board, absent a clear expression of legislative policy to the contrary.

430 F.2d at 997. See also Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930 (1978).

In like fashion, a railroad employee's attempt to forego railway adjustment board procedures by filing suit in federal court was rejected in Dorsey v. Chesapeake & Ohio Railway Co., 476 F.2d 243 (4th Cir. 1973). The court held specifically:

> Dorsey acknowledges that Andrews requires exhaustion of administrative remedies in cases alleging only a common law breach of contract but contends that

> Andrews left undecided the question a wrongful discharge complaint alleging a constitutional violation should be exempted from the exhaustion requirement. . . . We conclude that Andrews is controlling and that the district court properly found that Dorsey was required to exhaust his remedies with the NRAB before bringing suit in federal court.

476 F.2d at 254 (footnotes omitted).

There can be no doubt but that Puchert's claim with respect to his discharge is a dispute arising under and concerning the interpretation of a collective bargaining agreement provision. The collective bargaining agreement clearly covered claims for wrongful discharge. In fact, Puchert had filed such a claim in the form of a grievance and had been awarded reinstatement by an Adjustment Board only months prior to his filing this claim under the state statute. As such, the Railway Labor Act mandates that resolution of this minor dispute be by arbitration before the Adjustment Board.[9]

---

[9] If Appellant was dissatisfied with the Adjustment Board's decision in January, 1979,

Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). The Hawaii Supreme Court erred in its conclusion that this was not a minor dispute subject to the mandatory grievance procedure of the Railway Labor Act.

C. State Courts are Without Jurisdiction to Interfere in Areas of Exclusive Federal Regulations

The Hawaii Supreme Court found that Puchert's discharge was not a minor dispute because "[t]he resolution of the dispute in question does not hinge on the application or interpretation of the collective bargaining agreement between Pan Am and Puchert's union." Puchert v. Agsalud, No. 8908, Slip Op. at 7

---

[9]continued

he could have sought clarification of the award pursuant to 45 U.S.C. § 153(m), or he could have filed a petition for review with the United States District Court as allowed under 45 U.S.C. § 153(q).

(Hawaii January 27, 1984) (see Appendix A). The court apparently is of the opinion that because the complaint has been brought under a state statute, it does not find its source in the collective bargaining agreement. Therefore, the court concludes that this claim is not a minor dispute and is not preempted. Ibid. The obvious defect in this reasoning is that while the claim may be covered by a state statute or conceivably could be based on state tort law, it is also covered by the Pan Am-TWU collective bargaining agreement. As it is covered by the collective bargaining agreement, and hence subject to mandatory resolution by the Adjustment Board, the claim is preempted regardless of how it is characterized by the state court.[10]

---

[10]As Justice Rehnquist noted in Andrews v. Louisville & Nashville R. Co., 406 U.S. 320, 323-324 (1972):

The Hawaii Supreme Court's reasoning fails to recognize that federal regulation must be enforced in a uniform manner. States are precluded from any regulation where, as here, Congress has clearly and expressly articulated its intention to exclusively regulate a particular area.

The doctrine of preemption was first articulated by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). In Gibbons this Court ruled that pursuant to the supremacy clause,[11] state law must yield

---

[10]continued

> The fact that petitioner characterizes his claim as one for "wrongful discharge" does not save it from the Act's mandatory provisions for the processing of grievances.

So neither can the Hawaii Supreme Court's recharacterization of this claim as one arising under a state statute save it from the Act's mandatory provisions.

[11]U.S. Const. Art. VI, § 2.

where it conflicts with federal enactments. 22 U.S. (9 Wheat) at 210. Since Gibbons this Court has found state statutes preempted where either Congress has clearly articulated its intent to preempt an area, or where that intent is implicit from Congress' occupation of a field or some conflict between the state and federal schemes.

Preemption has been implied by examining the legislative history surrounding the statute's enactment,[12] by determining whether the nature of the subject matter requires national uniformity,[13] and by considering the pervasiveness of the federal statutory scheme.[14]

---

[12] See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 153 (1963).

[13] See, e.g., Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

[14] See, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926).

> Absent explicit preemptive language, Congress' intent to supercede state law altogether may be inferred because "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it", or because "the act of Congress may touch a field in which the federal system will be assumed to preclude enforcement of state laws on the same subject."

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141, 153 (1982).

As the Supreme Court recently observed in Silkwood v. Kerr-McGee Corp., 464 U.S. ___, 104 S. Ct. 615 (1984); "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." 104 S. Ct. at 621 (citations omitted). Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or impliedly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

All of the above criteria support federal preemption in this case. The

legislative history, supra, clearly implies a need to preempt the area, the subject matter demands national uniformity, and the federal statutory scheme is highly pervasive.

Where a conflict occurs between state and federal statutes such that compliance with both is impossible, then the state statute must yield. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). This has been held to be so even if the state statute is merely an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[15] This may result when the state statute discourages the conduct which the federal scheme seeks to encourage.[16] The instant case is one of both impossibility and

---

[15] See, e.g., Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[16] See L. Tribe, American Constitutional Law, 378 (1978).

discouragement. On the one hand it is impossible to have mandatory and "conclusive" resolution of minor disputes by the Adjustment Boards if Hawaii courts extend jurisdiction to hear the same claims under a state statute. And on the other hand, the availability of the Hawaii courts to hear these claims will discourage union employees under collective bargaining agreements subject to the Railway Labor Act from seeking the mandatory submission to the adjustment boards.

Where Congress has expressly indicated its intent to preempt an area, state law must yield. The language in the Railway Labor Act is clearly an explicit preemption of this area by Congress,[17] and has been so interpreted by this Court. Andrews v. Louisville & Nashville Railroad Co.,

---

[17] Section 3, First, 45 U.S.C. § 153, First.

406 U.S. 320 (1972). In no area has federal preemption been clearer than in matters concerning interstate commerce.[18] This Court expressly ruled in Andrews that the provisions under the Railway Labor Act mandating the submission of minor disputes to the adjustment boards preempt state courts of any jurisdiction to hear such matters. 406 U.S. at 322-325. Congress has here enacted legislation which clearly mandates that minor disputes are to be resolved by arbitration and a state may not enforce a law which would provide an alternative remedy to the exclusive remedy enacted by Congress. This would

---

[18] See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Douglas v. Seacoast Prod., Inc., 431 U.S. 265 (1977); Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); and Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).

clearly conflict with the provisions of the Railway Labor Act requiring mandatory and conclusive resolution by Adjustment Boards and would intrude upon this exclusive federal remedy.

Even absent this mandatory language, it is a fundamental principle of labor law that "settlement of disputes by the parties through the machinery of arbitration" is favored. United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). This Court in the Steelworkers trilogy provided the following guidance:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . .

363 U.S. at 584-585.

In this case, resolution of the grievability of the issues as well as the substantive issues themselves requires interpretation by the Board of Adjustment.

The Board of Adjustment should determine whether the grievance arising from Puckert's termination is grievable. To the extent necessary the Board of Adjustment is better able to construe ambiguous contract language and apply unambiguous provisions. This approach is appropriate where, as here, the agreement in issue does not give "positive assurance that the arbitration clause is not susceptible of the interpretation that covers the asserted dispute." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 582-583. "Doubts should be resolved in favor of coverage." 363 U.S. at 583. Arbitrators are in a better position to decide issues of arbitrability as they are more familiar with the customs and practices of a particular industry, the collective bargaining agreement at issue, and the parties to such an agreement. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

Finally, it should be noted that submission to arbitration under the Railway Labor Act is mandatory, whereas under other federal statutes it is merely permissive. This distinction is immanently clear when comparing the mandatory provisions for the adjustment of disputes contained in the Railway Labor Act[19] with the non-mandatory provisions of the National Labor Relations Act.[20] Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1955).

---

[19] 45 U.S.C. § 153, First, § 184.

[20] 61 Stat. 136, 29 U.S.C. § 173(d):

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation

D. The Hawaii Supreme Court Erroneously Applied Narrow Exceptions to Preemption Under the National Labor Relations Act to the Railway Labor Act

The Hawaii Supreme Court incorrectly assumed that the Railway Labor Act is synonymous with the National Labor Relations Act with respect to resolution of disputes by arbitration. The court relied upon cases which have created narrow exceptions to

---

20 (continued)

> of an existing collective bargaining agreement.... (Emphasis added.)

For a comparison of the deference to arbitration shown under the National Labor Relations Act in various situations, see generally United Technologies Corporation, 115 LRRM 1049 (1984); Columbia Typographical Union No. 101 (Washington Post Co.), 207 NLRB 831 (1973); North Shore Publishing, 206 NLRB 42 (1973); Mountain State Construction, 203 NLRB 1085 (1973); Baltimore Typographical Union No. 12 (A. S. Abell Co.), 201 NLRB 120 (1973); Joseph T. Ryerson, 199 NLRB 461 (1972); and Mailers Union No. 36 (Houston Chronicle), 199 NLRB 804 (1972).

preemption under the National Labor Relations Act. The court assumed these cases should also apply to the Railway Labor Act. The Hawaii Supreme Court further erred in concluding that since Congress has passed legislation creating certain statutory rights which may be concurrently enforced along with the National Labor Relations Act, that a state may also enact statutes to create rights notwithstanding the preemption doctrine. In short, the Hawaii Supreme Court's decision provides that because Congress may have enacted federal statutes providing independent rights which may provide concurrent jurisdiction to other federal rights, that a state may do the same.

For exactly these reasons, the Hawaii Supreme Court's reliance upon the cases cited in its opinion is misplaced. Each can be distinguished as recognizing a

concurrent federal right to those under the National Labor Relations Act pursuant to a federal statute. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973); and Harris v. Norfolk & Western Railway Co., 616 F.2d 377 (8th Cir. 1980), the federal right is based on Title VII of the Civil Rights Act of 1964.[21] In Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1980), the statute creating the right was the Fair Labor Standards Act.[22] While in the Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. 1980), the federal statute was the Employees' Retirement Insurance Security Act,[23] and in Johnson v. American Airlines, Inc., 487 F. Supp.

---

[21] 42 U.S.C. §§ 2000e et seq.

[22] 29 U.S.C. §§ 201 et seq.

[23] 29 U.S.C. §§ 1001 et seq.

1343 (N.D. Tex. 1980), the Age Discrimination in Employment Act[24] was the federal basis for jurisdiction.

This Court's recent interpretations of the National Labor Relations Act in New York Telephone Co. v. New York State Labor Dept., 440 U.S. 519 (1979), Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), and Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) have created certain narrow exceptions to the preemption formula enunciated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). However, there is no basis in any of these cases which would suggest that these exceptions should be

---

[24] 29 U.S.C. § 621 et seq.

applied to the Railway Labor Act. As Justice Powell stated in his dissent in the New York Telephone Co. case:

> The RUIA [Railroad Unemployment Insurance Act], together with the Railway Labor Act, is part of a special system of labor-management relations separate and distinct from the general structure established in the NLRA.

440 U.S. at 564 n. 19. (Powell, J., dissenting.)

As this Court's decisions establish, Congress did not intend to exclusively regulate labor relations under the National Labor Relations Act.[25] Rather, states may regulate various areas of state interest under the

---

[25] See, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

National Labor Relations Act.[26] There are no such exceptions under the Railway Labor Act, however, because federal regulation of minor disputes was intended to be mandatory and exclusive. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).

E. This Court has Recognized No Exception to the Mandatory Preemption of Minor Disputes Under the Railway Labor Act

The issue presented by this appeal has been well settled ever since this Court overruled Moore v. Illinois Central Railroad Co., 312 U.S. 630 (1949) in Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). However, in light of some of

---

[26] See, e.g., New York Telephone Co. v. New York State Labor Dept., 440 U.S. 519 (1979), Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), and Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977).

this Court's other decisions with respect to the National Labor Relations Act, there has developed some confusion amongst both state and federal courts with respect to when preemption should apply in a labor relations situation.[27]

This Court's own decisions dealing with preemption in the labor field, and the recognition of some narrow exceptions, have only arisen in the context of the National Labor Relations Act.[28] The narrow exceptions to preemption developed for particular situations which mirror a national policy or

---

[27] See generally Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio State L.J. 277 (1980).

[28] See, e.g., New York Telephone Co. v. New York State Labor Dept., 440 U.S. 519 (1979); Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978); Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977); and San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

concern for certain important issues such as civil rights, sex discrimination, age discrimination, and the application of rules to retirement pension plans, have arisen in the context of the National Labor Relations Act, which does not carry any mandatory provisions for the "conclusive" resolution of certain types of disputes. No exceptions have ever been recognized by this Court with respect to the Railway Labor Act and its mandatory provisions for resolution of minor disputes. Because the Hawaii Supreme Court has used this Court's pronouncements of narrow exceptions to preemption under the National Labor Relation's Act to avoid preemption under the Railway Labor Act, the time is ripe for this Court to reaffirm the clear intent of Congress to preempt jurisdiction for minor disputes under the Railway Labor Act. Congress has determined that all grievances arising under collective bargaining agreements under the

Railway Labor Act are to be subject to the exclusive jurisdiction of the Boards of Adjustment. The alternative is to open the floodgates to myriad state statute and state common law causes of action interfering with every aspect of the labor-management relationship in this sensitive area.

While states may claim certain interests are deeply rooted in local feeling and responsibility, such interest may not warrant an exception to preemption. The Hawaii statute which seeks to protect against unlawful discharge is certainly a local interest. Nevertheless, there is a mandatory alternative forum (which appellee had utilized previously with some success) for resolution of this dispute and the Hawaii statute does not warrant an exception to the express preemption under the Railway Labor Act.

State courts are clearly preempted and lack jurisdiction to address claims which

BEST AVAILABLE COPY

are minor disputes. There is no basis to argue that Congress ever intended to create any exception to this mandate for state statutes. To the contrary, the legislative history and the decisions of this Court emphasize the need for a national policy enforced by federal statute and preempting all state claims. Congress clearly announced that the national policy with respect to the Railway Labor Act is to leave the interpretation and application of the collective bargaining agreement to the procedure enunciated in the statute. Absent an equally clear pronouncement from Congress with respect to exceptions to this preemption, this delicate balance should not be upset.

If states are permitted to avoid the preemption of the Railway Labor Act by simply enacting a statute which would call an minor dispute by another name, then they have effectively gutted the entire national

statutory scheme with respect to labor management relations in the rail and airline industries. This is what this Court decided in Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972), and this is what this appeal requests be reaffirmed.

II. CONCLUSION

The Hawaii Supreme Court has improperly asserted jurisdiction over an area that is clearly preempted by federal law. Because Congress has preempted this area it must be left to Congress to create any exceptions. This Court should accept this appeal and enunciate an affirmation of the clear Congressional intent under the Railway Labor Act. This Court should distinguish the strong preemption mandated under the Railway Labor Act from the narrow exceptions to preemption permitted under the National Labor Relations Act. Until such a reaffirmation and clarification from this Court has been

pronounced, no federal statute shall stand immune to interference from state court jurisdiction. To avoid this potentially chaotic and hazardous situation, this Court should note jurisdiction and ultimately reverse the judgment of the Hawaii Supreme Court.

Respectfully submitted,

Barry W. Marr
James H. Hershey

Carlsmith, Carlsmith,
Wichman and Case
Suite 2200 -
Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-2500

Richard Schoolman
200 Park Avenue, 47th Floor
New York, New York 10166
Telephone: (212) 880-1112

Counsel for Appellant
Pan American World
Airways, Inc.

83-1952

Office - Supreme Court, U.S
FILED
MAY 25 1984
ALEXANDER L. STEVAS,
CLERK

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

v.

GEORGE PUCHERT,
Appellee.

APPENDIX TO THE JURISDICTIONAL STATEMENT

BARRY W. MARR
JAMES H. HERSLEY
Carlsmith, Carlsmith,
Wichman and Case
2200 Pacific Tower
Bishop Square
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-2500

RICHARD SCHOOLMAN
200 Park Avenue
47th Floor
New York, New York 10166
Telephone: (212) 880-1112

Counsel for Appellant
Pan American World
Airways, Inc.

TABLE OF CONTENTS

		Page
Appendix A	Opinion of the Supreme Court of the State of Hawaii, dated January 27, 1984	A-1
Appendix B	Notice of Appeal to the Supreme Court of the United States, filed April 18, 1984	A-16
Appendix C	Order, dated May 25, 1984	A-21
Appendix D	Hawaii Revised Statutes, Sections 378-31, *et seq.*	A-22
Appendix E	Railway Labor Act, 45 U.S.C., Sections 151, *et seq.*	A-25
Appendix F	National Labor Relations Act, Sections 141, *et seq.*	A-60
Appendix G	Agreement Between Pan American World Airways, Inc. and Transport Workers Union of America, AFL/CIO, Effective November 1, 1977	A-69

APPENDIX A

SUPREME COURT OF HAWAII
Syllabus

GEORGE K. PUCHERT, APPELLANT
v.
JOSHUA C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; and PAN AMERICAN WORLD AIRWAYS, Appellees

NO. 8908

APPEAL FROM THE FIRST CIRCUIT COURT
HONORABLE TOSHIMI SODETANI, JUDGE

(Civil No. 64062)

January 27, 1984

SUPREME COURT OF HAWAII—I

Syllabus

GEORGE K. PUCHERT, Appellant, *v.* JOSHUA C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; and PAN AMERICAN WORLD AIRWAYS, Appellees

NO. 8908

APPEAL FROM THE FIRST CIRCUIT COURT
HONORABLE YOSHIMI SODETANI, JUDGE

(CIVIL NO. 64062)

JANUARY 27, 1984

LUM, C.J., PADGETT, HAYASHI, AND WAKATSUKI, JJ.,
AND ASSOCIATE JUDGE TANAKA IN PLACE OF
NAKAMURA, J., DISQUALIFIED

APPEAL AND ERROR — *determination of questions of jurisdiction in general.*

Although federal pre-emption was not the basis for dismissal by the administrative agency and the lower court, the question of a court's jurisdiction cannot be disregarded.

LABOR RELATIONS — *labor relations act — validity — effect of federal legislation — exclusive, concurrent, and conflicting jurisdiction.*

The doctrine of labor law pre-emption concerns the extent to which congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor-management relations.

SAME — *mediation, conciliation, and arbitration — Railway Labor Act.*

The Railway Labor Act provides for compulsory arbitration to settle "minor disputes" which exist where a collective bargaining agreement provides a remedy for the alleged wrongful act.

SAME — *unfair labor practices — discharge — work injury — judicial remedies*

A complaint of unlawful discharge from employment solely because the discharged employee suffered a work injury compensable under the state workers' compensation law finds its source in the statute and not in the collective bargaining agreement.

SAME — *mediation, conciliation, and arbitration — Railway Labor Act — judicial remedies.*

A complaint of unlawful discharge from employment based upon a statutory right is not subject to mandatory arbitration under the Railway Labor Act.

SAME — *same — arbitration agreements — matter subject to arbitration.*

An arbitrator may only arbitrate disputes arising under the provisions of the collective bargaining agreement and is limited to the interpretation and application of provisions contained within the agreement.

SUPREME COURT OF HAWAII—2

Opinion of the Court

SAME — *same — discharge and layoff — judicial remedies.*

Where a discharged employee's claim of unlawful discharge has its source in state statute, and his claim is not identical to any claim he may make under the collective bargaining agreement, he is not limited to pursuing remedies in the grievance and arbitration procedures established under the collective bargaining agreement.

SAME — *labor relations acts — validity — effect of federal legislation.*

Although a discharged employee's state law claim of unlawful discharge did not interfere with the provisions of the collective bargaining agreement, the court must also consider whether the application of the state statute interferes with the scheme of the federal Railway Labor Act.

SAME — *same — same — same.*

Problems and considerations involved in federal-state relations under the Railway Labor Act are analogous to those under the National Labor Relations Act.

SAME — *same — same — same.*

State statutes prohibiting unlawful discharges for injuries compensable under workers compensation laws are not pre-empted by the Railway Labor Act because such laws are pre-eminently a matter of state concern and are of peripheral concern to the federal labor laws.

SAME — *unfair labor practices — discharge — work injury — judicial remedies.*

The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute.

STATUTE — *general rules of construction — plain meaning.*

Where the language of a statute is plain and unambiguous, and the literal application of the language would not produce an absurd or unjust result and the language is clearly consistent with the purposes and policies of the statute, judicial construction is inappropriate and the court's duty is to give effect to the law according to its plain and obvious meaning.

SAME — *same — intention of legislature.*

Where the language of the statute is ambiguous, the court's primary objective is to ascertain and give effect to legislative intention.

WORKERS' COMPENSATION — *liberal or strict construction in general.*

The court has long recognized the remedial character of the workers compensation statutes and has construed them liberally to effectuate their beneficient purposes.

LABOR RELATIONS — *unfair labor practices — discharge — work injury — judicial remedies — liberal construction.*

Since the legislative intent of HRS § 378-32(2) is to protect claimants under the workers' compensation statute, the time limits established under HRS § 378-33(b) should be liberally construed to accomplish the humanitarian objective of the legislation.

SAME — *same — same — same — same.*

The construction of HRS § 378-33(b) allowing for a hearing on the merits and providing the employee with the avenue by which he may be afforded a remedy for the violation of his rights would be more consonant with the legislative enactment of remedial social legislation for workers than would a technical reading which would deny relief without an opportunity to be heard.

SAME — *same* — *same* — *same* — *same*.

HRS § 378-33(b) establishes only the outside limit after which a complaint may not be filed. An employee may file a complaint prior to the date he is able to return to work.

OPINION OF THE COURT BY WAKATSUKI, J.

This is an appeal of the first circuit court's affirmance of the director of labor and industrial relations' dismissal of Appellant's complaint of unlawful discharge from employment pursuant to Hawaii Revised Statutes (HRS) § 378-32(2). The complaint was dismissed for untimely filing under HRS § 378-33(b).

The primary issue involves the construction of a statute, HRS § 378-33. As construed by the director and the lower court, HRS § 378-33(b) requires the filing of a complaint of unlawful discharge from employment only after an employee is able to return to his former job, and not any sooner. We hold that such a construction of the statute does not comport with the legislative purpose and intent of HRS §§ 378-32 and 378-33, and therefore, we reverse.

The parties involved in this action are (1) Appellant Puchert, the employee who filed the complaint of unlawful discharge; (2) Appellee Pan American World Airways (Pan Am), the employer against whom the complaint was filed; and (3) Appellee Agsalud, Director of the Stat Department of Labor and Industrial Relations (Director) who dismissed Puchert's complaint.

At the time of his alleged unlawful discharge, Puchert had been employed for several years as a port steward by Pan Am. On several occasions, Puchert had suffered back injuries at work, the last of which occurred on December 30, 1978. Due to this December 30th injury, Puchert did not return to work until January 6, 1979, at which time he was allowed to do only light duty work upon the instructions of his chiropractor. By letter of January 9, 1979, Puchert was discharged by Pan Am. The basis for this discharge was Puchert's physical limitations in performing his work.

On January 14, 1979, Puchert, through his union (Transport Workers Union of America), filed a grievance with Pan Am as to his discharge pursuant to a collective bargaining agreement between Pan Am and the Transport Workers Union. The grievance was brought before the Board of Adjustment for arbitration on Feb-

ruary 7, 1979. The Board's decision modified Puchert's dismissal to a medical leave of absence not to exceed six months, and further, required that Puchert, during that six-month period, obtain a medical report from a physician approved by Travelers Insurance Company and a permanent disability rating from the State Department of Labor and Industrial Relations (department) Workers Compensation Division which would not restrict him from performing any of the duties of a port steward. The decision further stated that, upon his return to work, Puchert would be required to comply with Pan Am's attendance standards.

On June 1, 1979, Puchert filed a complaint, pursuant to HRS § 378-32, for unlawful discharge against Pan Am with the department's Enforcement Division. Prior to filing his complaint, Puchert was advised by department personnel to wait until he was released by his doctor to return to work but this advice was not heeded and the complaint was filed.

Five days prior to the expiration of Puchert's medical leave of absence, as granted by the Board of Adjustment, Pan Am asked Puchert to advise the compandy of his intention to return to work.

On August 1, 1979, Puchert's chiropractor submitted a letter to the department stating that Puchert was still only available for light duty work. However, on August 6, 1979, Puchert was able to obtain a letter from the same chiropractor releasing him for regular duty "on a trial basis."

The facts are not clear whether Puchert reported for duty on August 7, 1979, and was then discharged, or whether he received notification of his termination in some other manner. Nonetheless, Pan Am contends that on August 7, 1979, Puchert had not complied with the terms of the Board of Adjustment's decision, and therefore he had no right to return to work.

Neither on August 7, 1979, nor at any time thereafter did Puchert file another complaint with the department for unlawful discharge.

In June, 1980, a year after Puchert filed his complaint for unlawful discharge with the department, and ten months from the date he was allegedly able to return to work as a port steward, the department held hearings on Puchert's complaint of June 1, 1979. Thereafter, the hearing officer recommended that the complaint be dismissed for lack of jurisdiction due to the untimely filing of the

complaint. The hearing officer concluded that under HRS § 378-33, the only time Puchert could file a complaint for unlawful discharge was within thirty days after his January 9, 1979 discharge, or within thirty days from the date he was able to return to work. Director Agsalud concurred with the hearing officer's recommended decision. Puchert appealed, and the circuit court affirmed the director's decision.

I.

Before proceeding to an analysis of HRS § 378-33, we address Pan Am's assertion the federal pre-emption applies in view of the federal labor law which provides that where a collective bargaining agreement provides for a resolution of a dispute of this nature through grievance and arbitration proceedings, this Court lacks jurisdiction. Although federal pre-emption was not the basis upon which the director and the circuit court dismissed Puchert's complaint, the question of a court's jurisdiction cannot be disregarded. *State v. Johnston*, 63 Haw. 9, 11, 619 P.2d 1076, 1077 (1980).

The doctrine of labor law pre-emption concerns the extent to which congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor management relations. *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 527 (1979).

The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, which applies in this case, provides for compulsory arbitration to settle "minor disputes". *Andrews v. Louisville and Nashville RR Co.*, 406 U.S. 320 (1972), *International Assn. of Machinists, AFL-CIO v. Central Airlines*, 372 U.S. 682 (1963), *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983). A "minor dispute" exists where a collective bargaining agreement provides a remedy for an alleged wrongful act. *Andrews, supra; Schroeder, supra; RFA Express, Inc. v. Brotherhood of Ry, Airline and Steamship Clerks, etc.*, 459 F.2d 226 (5th Cir. 1972).

Cases holding that state law claims are pre-empted by the RLA are clearly distinguishable. The complaints filed in those cases constituted state law claims that were non-existent but for the collective bargaining agreement which provided remedies for such claims, or the state law claims were identical to the contractual claims provided for in the collective bargaining agreement. *E.g., Andrews v. Louisville*

and Nashville RR Co., supra, (state law claim of unlawful discharge depended solely on contract right not to be discharged); *Schroeder v. Trans World Airlines, Inc., supra* (complaint of unlawful business practices in violation of California statutes was actually a complaint of wrongful demotion under the collective bargaining contract); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983) (complaints alleging intentional infliction of emotional distress referred to rights covered or substantially related to the collective bargaining agreement); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978) (emotional distress incident of discharge from employment rather than result of alleged conspiracy); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983) (state claim raised identical to claim employee would have made had he pursued his grievance through channels specified in the collective bargaining agreement).

Puchert's complaint, however, does not constitute a "minor dispute" subject to mandatory arbitration under the RLA. The resolution of the dispute in question does not hinge on the application or interpretation of the collective bargaining agreement between Pan Am and Puchert's union. Puchert complains of a violation of his right not to be discharged from his employment solely because he suffered from a work injury compensable under the state's worker's compensation law. This right finds its source not in the collective bargaining agreement between Pan Am and Puchert's union, but in the statute. *See Air Line Pilots Assn. v. Northwest Airlines, Inc.*, 627 F.2d 272 (D.C. Cir. 1980).

If Puchert were not permitted to pursue his claim of wrongful discharge under HRS § 378-32 before the state agency and courts, he would have no forum in which to press his claim. An arbitrator may only arbitrate disputes arising under the provisions of the collective bargaining agreement, 51A *C.J.S.* Labor Relations § 429 (1967), and is limited to the interpretation and application of provisions contained within the agreement. *United Steelworkers of America v. Enterprise Wheel*, 363 U.S. 593 (1960). The arbitrator — in this case the Board of Adjustment — would have no authority to consider Puchert's statutory claim. *See Air Line Pilots Assn. v. Northwest Airlines, supra; Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1973).

Other employment relations cases brought under federal statutes have held that where the right upon which the complaint is

based is statutory, courts are not denied jurisdiction merely because a collective bargaining agreement exists which provides for grievance and arbitration procedures. *Alexander v. Gardner-Denver Co., supra; Harris v. Norfolk and Western Railway Co.*, 616 F.2d. 377 (8th Cir. 1980) (race discrimination suits brought under Title VII of the Civil Rights Act of 1964); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1980) (wage dispute under Fair Labor Standards Act); *Airline Pilots Assn. v. Northwest Airlines, supra* (violation of ERISA fiduciary standards in managing collectively bargained pension plan); *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343 (N.D. Tex. 1980) (suit brought under the Age Discrimination in Employment Act).

State court jurisdiction has similarly been upheld where it was clear that the source of the right alleged to have been violated was state statute rather than the collective bargaining agreement. *Bald v. RCA Alascom*, 569 P.2d 1328 (Alaska 1977) (religious discrimination in violation of state antidiscrimination statute); *Franklin Manufacturing Co. v. Iowa Civil Rights Commission*, 270 N.W.2d 829 (Iowa 1978) (employer's group insurance plan violative of state sex discrimination laws); *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), and *Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 611 P.2d 281 (Oregon 1980) (violation of state statute prohibiting discharge for filing workers compensation claims).

Inasmuch as Puchert's claim of unlawful discharge has its source in state statute and his claim is not identical to any claim he may make under the collective bargaining agreement, we hold that Puchert is not limited to pursuing remedies in the grievance and arbitration procedures established under the collective bargaining agreement.

Although we find that Puchert's state law claim does not interfere with the provisions of the collective bargaining agreement, we must also consider whether application of state law in this case interferes with the scheme of the RLA.

This Court recently reviewed the question of pre-emption in the area of labor law in *Gouveia v. Napili Kai, Ltd.*, 65 Haw. 189, 649 P.2d 1119 (1982). There we concluded that the National Labor Relations Act (NLRA) bestowed exclusive jurisdiction to the National Labor Relations Board on certain matters, *Id.* at 193-194, quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Yet congress did not wholly pre-empt state regulation. *Id.* at 194, quoting *Garner v.*

Teamsters Union, 346 U.S. 485 (1953). States retained the "power to regulate where the activity regulated was merely a peripheral concern of the [NLRA], and "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, . . . [it] could not infer that congress had deprived the states of power to act." *Id.* at 195, quoting *San Diego Bldg. Trades Council v. Garmon*, *supra*.

Gouveia and the cases cited therein examined the conflict between state law and the NLRA. This case, on the other hand, involves federal-state relations under the RLA, but the problems and considerations are analogous. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), and courts have applied standards adopted in NLRA pre-emption cases to RLA cases. *E.g., Beers v. Southern Pacific Transportation Company, supra; Magnuson v. Burlington Northern, Inc., supra; Majors v. U.S. Air Inc.*, 525 F. Supp. 853 (D. Md. 1981); *Jackson v. Consolidated Rail Corp., supra.*

The precise issue of whether state statutes prohibiting unlawful discharges for injuries compensable under workers' compensation laws withstands federal pre-emption was presented in *Peabody Galion v. Dollar*, *supra*, and *Vaughn v. Pacific Northwest Bell Co.*, *supra*.

The Oklahoma statute examined in *Peabody Galion* and the Oregon statute in *Vaughn* are substantially similar to HRS § 378-32. Both the Tenth Circuit Court of Appeals[1] and the Oregon Supreme Court, respectively, concluded that the state statutes are not pre-empted by federal labor laws. Both courts found that the subject of the respective statutes was of peripheral concern to the federal laws because it had nothing to do with collective bargaining or union organization. *Peabody Galion*, 666 F.2d at 1316; *Vaughn*, 289 Or. at 82, 611 P.2d at 287. Additionally, workers' compensation "is pre-eminently a matter of state concern," *Peabody Galion*, 666 F.2d at 1316, and the "state has a substantial interest in protecting the integrity of its workers' compensation system." *Vaughn*, 289 Or. at 82, 611 P.2d at 287.

We agree with the analysis of both the Tenth Circuit and the Oregon Supreme Court in these cases. While both cases were de-

[1] *Peabody Galion* came before the Tenth Circuit Court of Appeals as a diversity action.

cided in the context of the NLRA, we find the same standard applicable here and the considerations analogous. We, therefore, hold that HRS § 378-32, is not pre-empted by the RLA in this case, and that the department of labor and the state courts have jurisdiction to hear Puchert's complaint. The source of the right on which Puchert bases his complaint is state statute, not the collective bargaining agreement. His claim of discrimination in violation of the statute could not be considered by the Adjustment Board whose authority extends only to interpretation or application of the collective bargaining agreement. Thus, Puchert's only means of having his cause of action heard is through the administrative and judicial procedures prescribed by state statute. Furthermore, the state statute on which Puchert relies in advancing his unlawful discharge claim is not pre-empted by the RLA. The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute. Such regulation by the state does not interfere with the scheme and purposes of the RLA.

II.

We now turn to an analysis of HRS §378-33(b), which reads:

> No complaint shall be filed after the expiration of thirty days after the alleged act of unlawful suspension or discharge, except that an alleged act of unlawful discharge under subsection 378-32(2) occurring while the aggrieved employee is still physically or mentally incapacitated and unable to work shall be considered to have occurred on the date the aggrieved employee is able to return to work.

HRS § 378-32(2)[2] makes it unlawful for an employer to suspend or

---

[2] § 378-32 Unlawful suspension or discharge from employment. It shall be unlawful for any employer to suspend or discharge any of his employees:

(2) Solely because the employee has suffered a work injury which arose out of and in the course of his employment with the employer and which is compensable under chapter 386 unless the employee is not longer capable of performing his work as a result of the work injury and the employer has no other available work with the employee is capable of performing. Any employee who is discharged

discharge any employee solely because of a work injury compensable under the workers' compensation statutes, HRS chapter 386.

Where the language of the statute is plain and unambiguous, and the literal application of the language would not produce an absurd or unjust result, and the language is cleraly consistent with the purposes and policies of the statute, judicial construction is inappropriate and it is our duty to give effect to the law according to its plain and obvious meaning. *State v. Palama*, 62 Haw. 159, 612 P.2d 1168 (1980).

However, where the language of the statute is ambiguous, the court's primary objective is to ascertain and give effect to legislative intention. *In re Hawaiian Telephone Co.*, 61 Haw. 572, 608 P.2d 383 (1980).

We find the statute here to be capable of more than one interpretation. Appellees construe HRS § 378-33(b) to allow an employee two discrete periods in which to file a complaint for unlawful discharge or suspension. The first is within 30 days after the alleged act of unlawful discharge or suspension. The second is within 30 days after the employee is able to return to work. Under this construction, assuming Puchert was discharged on January 9, 1979, he had from then until February 9, 1979 in which to file his complaint; or, assuming Puchert was able to return to work on August 7, 1979, he had within 30 days after August 7th to file his complaint of unlawful discharge.

Appellant argues that HRS § 378-33(b) establishes only the outside time limit for filing a complaint, but does not impose a time *before* when a complaint may not be filed. *See Anisgard v. Exxon Corp.*, 409 F. Supp. 212 (E.D. La. 1975). As applied to this case, assuming Puchert had been incapacitated at the time of discharge, he could have filed a complaint at any time prior to thirty days after he was able to return to work.

---

because of the work injury shall be given first preference of re-employment by the employer in any position which the employee is capable of performing and which becomes available after the discharge and during the period thereafter until the employee secures new employment. This paragraph shall not apply to any employer in whose employment there are less than three employees at the time of the work injury or who is a party to a collective bargaining agreement which prevents the continued employment or re-employment of the injured employee.

Finding both interpretations of section 378-33(b) to be reasonable, and therefore ambiguous, we turn our efforts to discerning legislative intent.

A.

The substance of section 378-32(2), which creates the right of action for unlawful retaliatory discharge, was originally enacted as part of the workers' compensation statute. Act 116, § 97-135, 1963 Haw. Sess. Laws.[3] In 1970, a legislative determination was made that this statute was more appropriately placed with other statutes dealing with the enforcement division of the department of labor and industrial relations. That statute was therefore repealed and substantially re-enacted as HRS § 378-32. Act 64, § 2, 1970 Haw. Sess. Laws; Sen. Stand. Comm. Rep. No. 606-70 in 1970 Senate Journal at 1257.

The purpose of this statute is to preserve the integrity of the workers'compensation law by protecting employees from retaliatory discharges. If an employer could, with impunity, coerce an employee into foregoing his rights, the employer would be able to destroy the function of the law and circumvent an obligation imposed upon him by the legislature. Larson, *Workmen's Compensation Law* § 68.36(a).

Prior to 1974, HRS § 378-33 required all complaints to be filed within thirty days of the alleged unlawful discharge or suspension. However, in 1974, the legislature was prompted to "extend the time within which an employee who has been unlawfully suspended or discharged in violation of § 378-32(2) may file a complaint. . . ." Hse. Stand. Comm. Rep. No. 624-74 in 1974 House Journal at 795-796. This was due to the fact that some employees who were incapacitated by work injuries had been deprived of rights under the law because they were unable to file complaints within thirty days of the discharge or suspension. Thus, HRS § 378-33(b) was amended.[4]

---

[3] Originally designated as § 97-135; later redesignated as § 386-141.

[4] The underscored language was added in 1974:

No complaint shall be filed after the expiration of thirty days after the alleged act of unlawful suspension or discharge, *except that an alleged act of unlawful*

This legislative history suggests the remedial purpose of the provision extending the time for filing complaints.

Furthermore, this court has long recognized the remedial character of the workers' compensation statutes and has construed them liberally to effectuate their beneficient purposes. *Evanson v. University of Hawaii*, 52 Haw. 595, 483 P.2d 187 (1971); Re *Ichijiro Ikoma*, 23 Haw. 291 (1916).

Since the legislative intent of HRS § 378-32(2) is to protect claimants under our workers' compensation law, the time limits established under § 378-33(b) should be liberally construed to accomplish the humanitarian objective of the legislation. The construction of this section allowing a hearing on the merits and providing the employee with the avenue by which he may be afforded a remedy for the violation of his rights would be more consonant with the legislative enactment of remedial social legislation for workers than would a technical reading which would deny relief without an opportunity to be heard. We fail to see that a construction allowing an early filing would seriously compromise to undermine any of the goals or policies of the legislation. Nor have Appellees shown any prejudice by such construction.

B.

In analogous situations where employment discrimination suits were brought under the Federal Civil Rights and Age Discrimination Acts, federal courts have refused to dismiss suits prematurely filed. *E.g., Hoover v. Opportunities Indus. Ctr. of Roanoake Valley, Inc.* 348 F. Supp. 657 (W.D. Va. 1972), *Henderson v. Eastern Freight Ways, Inc.*, 460 F.2d 258 (4th Cir. 1972), *Budreck v. Crocker National Bank*, 407 F. Supp. 635 (N.D. Cal. 1976), *Anisgard v. Exxon Corp, supra.* Recognizing the remedial and humanitarian nature of the respective statutes, *Henderson v. Eastern Freight Ways, Inc., supra; Moses v. Falstaff Brewing Co.*, 525 F.2d 92 (8th Cir. 1975), the federal courts have generously construed the law to afford claimants hearings on

---

discharge under subsection 378-32(2) occurring while the aggrieved employee is still physically or mentally incapacitated and unable to work shall be considered to have occurred on the date the aggrieved employee is able to return to work.

the merits and to prevent the loss of valuable rights. *See, also, Berg v. Richmond Unified School District*, 528 F.2d 1208 (9th Cir. 1975), *Black Musicians of Pittsburgh v. Local 60-471, American Federation of Musicians*, 375 F. Supp. 902 (W.D. Pa. 1974).

C.

Appellee Agsalud urges affirmance of the circuit court's decision on the grounds that a liberal interpretation of HRS § 378-33(b) would open the "flood gates" for untimely filed complaints and thereby create a great inconvenience and an onerous administrative burden to the agency. (Answering Brief of Appellee Agsalud, p. 19.)

By construing HRS § 378-33(b) liberally to preserve Puchert's claim here, we do not require the department to hold all complaints in abeyance until an event occurs which substantiates the claim. If, at the time the department is ready to proceed with a hearing of the complaint but the claimant is still unable to return to work, the department then may exercise its discretion to continue the hearing until timely moved on by the claimant, or may dismiss the complaint without prejudice.[5] *See Henderson v. Eastern Freight Ways Inc., supra; Black Musicians of Pittsburgh v. Local 60-471, American Federation of Musicians, AFL-CIO, supra.*

We also note that the department sits in an adjudicatory capacity in hearing complaints of unlawful discharge, HRS § 378-35, and therefore, it must remain neutral. Whether the filing of a complaint at any given time may be a convenience or inconvenience to the agency is irrelevant and not a proper consideration in adjudicating disputes between the employer and employee.

Based on the foregoing, we hold that an employee, pursuant to HRS § 378-32(2) and (3), may file a complaint prior to the date he is able to return to work.

---

[5] Continuing a hearing, rather than dismissing a complaint, avoids the problem of having to re-file and re-process the same paperwork. When the claimant moves on for hearing after the continuance, he is, in essence, re-filing the complaint. Such "re-filing" must be done within the time limits imposed by HRS § 378-33(b), *i.e.*, no later than thirty days after the claimant is able to return to work.

III.

Lastly, Pan Am argues that Appellant's claim for relief should be barred by the equitable doctrine of laches. Upon a careful review of the record, we conclude that Pan Am's assertion of laches is without merit. *See Adair v. Hustace*, 64 Haw. 314, 640 P.2d 294 (1982).

CONCLUSION

We hold that the circuit court erred in affirming the director's decision dismissing Puchert's complaint for untimely filing. Further, we hold that Puchert's statutory claim is not pre-empted by the collective bargaining agreement or federal labor laws, nor is his claim barred by the doctrine of laches. We, therefore, reverse and remand Puchert's complaint to the department for a hearing on the merits.

Herbert R. Takahashi for appellant.

Arthur Muraoka and *Jared H. Jossem* (*Jared H. Jossem* and *John L. Knorek* on the brief; *Torkildson, Katz, Jossem & Loden* of counsel) for appellee Pan American World Airways.

On the brief: *Juliette T. Sarmiento*, Deputy Attorney General, for appellee Joshua C. Agsalud, Director, Department of Labor & Industrial Relations.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

GEORGE K. PUCHERT, Appellant, vs. JOSHUA C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; and PAN AMERICAN WORLD AIRWAYS, Appellees.	NO. 8908

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Filed April 18, 1984

NO. ____

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1983

GEORGE K. PUCHERT, Appellant, vs. JOSHUA C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; and PAN AMERICAN WORLD AIRWAYS, Appellees.	)	NO. 8908

FILED
1984 APR 18 AM 9:44
Sandra N. Yasui
CLERK SUPREME COURT

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF SERVICE

Of Counsel:

CARLSMITH, CARLSMITH,
WICHMAN AND CASE

BARRY W. MARR 1937-0
JAMES H. HERSHEY 3199-0
1001 Bishop Street
Pacific Tower, Suite 2200
Honolulu, Hawaii 96813
Telephone: 523-2500

Attorneys for Appellee
Pan American World Airways

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the State of Hawaii.

APR 18 1984

Dated, at Honolulu, Hawaii, _____ A.D. 19__

Clerk, Supreme Court, State of Hawaii

Of Counsel:

CARLSMITH, CARLSMITH,
WICHMAN AND CASE

BARRY W. MARR 1937-0
JAMES H. HERSHEY 3199-0
1001 Bishop Street
Pacific Tower, Suite 2200
Honolulu, Hawaii 96813
Telephone: 523-2500

Attorneys for Appellee
Pan American World Airways

IN THE SUPREME COURT OF THE

STATE OF HAWAII

GEORGE K. PUCHERT, Appellant, vs. JOSHUA C. AGSALUD, in his capacity as Director of the State of Hawaii, Department of Labor and Industrial Relations; and PAN AMERICAN WORLD AIRWAYS, Appellees.	NO. 8908 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that PAN AMERICAN WORLD AIRWAYS, the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment

(CERTIFICATE OF SERVICE ATTACHED)

of the Supreme Court of the State of Hawaii holding that Hawaii Revised Statute § 378-33 is not repugnant to or pre-empted by the Railway Labor Act, 45 U.S.C. § 151 et seq., entered in this action on January 27, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Barry W. Marr

BARRY W. MARR
JAMES H. HERSHEY

Attorneys for Appellant
Pan American World Airways

No. 8908
George K. Puchert vs.
Joshua C. Agsalud, et al.,
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES has been served on opposing counsel by hand delivering said copies on APR 18, 1984, to the following addresses:

HERBERT R. TAKAHASHI, ESQ.
Room 208
547 Halekauwila Street
Honolulu, Hawaii 96813

Attorney for Appellant

JULIETTE T. SARMIENTO, ESQ.
First Insurance Center
Third Floor
1100 Ward Avenue
Honolulu, Hawaii 96814

Attorney for Appellee
Joshua C. Agsalud, in his
capacity as Director of
the State of Hawaii,
Department of Labor and
Industrial Relations

DATED: Honolulu, Hawaii, APR 18, 1984.

Barry W. Marr
BARRY W. MARR
JAMES H. HERSHEY

Attorneys for Appellee
Pan American World
Airways

APPENDIX C

Supreme Court of the United States

No. A-844

PAN AMERICAN WORLD AIRWAYS, INC.,

Appellant,

v.

GEORGE PUCHERT

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including May 25, 1984.

/s/ William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 20th day of April, 1984.

APPENDIX D

PART III. UNLAWFUL SUSPENSION OR DISCHARGE

§378-31 Definitions. As used in this part:

(1) "Director" means the director of labor and industrial relations.

(2) "Department" means the department of labor and industrial relations.

(3) "Employer" includes any individual, partnership, association, joint-stock company, trust, corporation, the personal representative of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any persons, but shall not include the State or any political subdivision thereof or the United States.

(4) "Employee" includes any person suffered or permitted to work.

(5) "Wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation. It shall include the reasonable cost, as determined by the director under chapter 387, to the employer of furnishing an employee with board, lodging, or other facilities if the board, lodging, or other facilities are customarily furnished by the employer to his employees but shall not include tips or gratuities of any kind.

(6) "Appeal board" means the labor and industrial relations appeal board. [L 1967, c 22, pt of §1; HRS §378-31; am L 1976, c 200, pt of §1]

§378-32 Unlawful suspension or discharge from employment. It shall be unlawful for any employer to suspend or discharge any of his employees:

(1) Solely because the employer was summoned as a garnishee in a cause where the employee is the debtor or because the employee has filed a petition in proceedings for a wage earner plan under Chapter XIII of the Bankruptcy Act; or

(2) Solely because the employee has suffered a work injury which arose out of and in the course of his employment with the employer and which is compensable under chapter 386 unless the employee is no longer capable of performing his work as a result of the work injury and the employer has no other available work which the employee is capable of performing. Any employee who is discharged because of the work injury shall be given first preference of re-employment by the employer in any position which the employee is capable of performing and which becomes available after the discharge and during

the period thereafter until the employee secures new employment. This paragraph shall not apply to any employer in whose employment there are less than three employees at the time of the work injury or who is a party to a collective bargaining agreement which prevents the continued employment or re-employment of the injured employee. [L 1967, c 22, pt of §1; HRS §378-32; am L 1970, c 64, §2]

§378-33 Complaint against unlawful suspension or discharge. (a) Any employee aggrieved by an alleged unlawful suspension or discharge may file with the department of labor and industrial relations a complaint in writing, stating the name and address of the employer alleged to have committed the unlawful suspension or discharge, and shall set forth the particulars thereof and other information as may be required by the department.

(b) No complaint shall be filed after the expiration of thirty days after the alleged act of unlawful suspension or discharge, except that an alleged act of unlawful discharge under subsection 378-32(2) occurring while the aggrieved employee is still physically or mentally incapacitated and unable to work shall be considered to have occurred on the date the aggrieved employee is able to return to work. [L 1967, c 22, pt of §1; HRS §378-33; am L 1974, c 150, §1]

§378-34 Proceeding and hearing on complaint. (a) After the filing of any complaint, the department of labor and industrial relations shall serve a copy of the complaint upon the employer charged. Service may be by delivery to the employer or by mail. The employer may file an answer to the complaint.

(b) A hearing on the complaint shall be held by the department in conformance with chapter 91. [L 1967, c 22, pt of §1]

§378-35 Findings and order. If the department of labor and industrial relations finds, after a hearing, that an employer has unlawfully suspended or discharged an employee in violation of section 378-32, the department may order the reinstatement of the employee with or without back pay or may order the payment of back pay without reinstatement. [L 1967, c 22, pt of §1]

§378-36 Judicial review. Any person aggrieved by the order of the department of labor and industrial relations shall be entitled to judicial review as provided by section 91-14. [L 1967, c 22, pt of §1]

§378-37 Petition for enforcement of order. If any employer fails or neglects to comply with the final order of the department of labor and industrial relations from which no appeal has been taken as provided by this part, the

department or the employee affected may petition the circuit court wherein the employer resides or transacts business for the enforcement of the order and for any other appropriate relief. Upon filing of the petition and the record of the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which the order was entered, and the order, and upon service of proper notice thereof upon the employer, the circuit court shall have jurisdiction in the premises. [L 1967, c 22, pt of §1]

APPENDIX E

§ 151. Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or

within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

§ 152. General duties—Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the

wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Violations; prosecution and penalties

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to

tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days

after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and

four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 151a and section 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or

by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in

which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its

members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

System, group, or regional boards; establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter,

from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to

agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

Note 233

Where right to appeal from a judgment in action to enforce award of National Railroad Adjustment Board had been extinguished before United States intervened, such intervention could not be used to renew that lost right, and notice of appeal, not filed within 30 days from entry of judgment, was not timely and Court of Appeals had no jurisdiction to hear appeal. Id.

234. —— Violations of collective bargaining agreements

Rejection by federal courts of Railway Adjustment Board's interpretation of collective bargaining agreement was beyond their province where it could not be said that Board's determination that discharged engineer was entitled to reinstatement and back pay was wholly baseless and completely without reason. Gunther v. San Diego A. E. Ry. Co., Cal.1965, 86 S.Ct. 368, 382 U.S. 257, 15 L.Ed.2d 308.

On issue of amount of award to which wrongfully discharged engineer was entitled, district court could determine how much time had been lost by reason of wrongful removal and could determine any proper issues that could be raised with reference to amount of money necessary to compensate for time lost. Id.

Following determination by National Railroad Adjustment Board as to whether railroad violated collective bargaining agreement by contracting out certain work and assigning certain other work to employees represented by union competing with complaining union, neither district court nor Court of Appeals would be permitted to reappraise the record and determine independently whether the railroad had violated agreement. Brotherhood of R. R. Signalmen of America v. Southern Ry. Co., C.A.N.C. 1967, 380 F.2d 30, certiorari denied 88 S. Ct. 321, 389 U.S. 958, 19 L.Ed.2d 368.

Regardless of correctness at time of entry of District Court's judgment which allowed nominal damages rather than the full day's pay awarded by Adjustment Board for each incident of railroad's collective bargaining contract violation involving "herding" of locomotives, Court of Appeals was required to give appellate consideration to that judgment in view of 1966 Amendments to this section deleting exception of money awards from provision making awards of the Board final and binding and making its findings and order conclusive. Brotherhood of R. R. Trainmen v. Denver & R. G. W. R. Co., C.A.Colo.1966, 370 F.2d 833, certiorari denied 87 S.Ct. 1375, 386 U.S. 1018, 18 L.Ed. 2d 456.

United States District Court had no jurisdiction to review award made by special board of adjustment in dispute which arose between union and railroad over application of mediation agreement to a particular group of employees represented by union. Brotherhood of Ry., Airline and S. S. Clerks, Freight Handlers, Exp. and Station Emp. v. Special Bd. of Adjustment No. 605, D.C.Ill.1968, 286 F.Supp. 397, affirmed 410 F.2d 520, certiorari denied 90 S.Ct. 177, 396 U.S. 887, 24 L.Ed.2d 162.

Substitution by court of its interpretation of collective bargaining agreement for that of National Railroad Adjustment Board would be improper. Raabe v. Florida East Coast Ry. Co., D.C.Fla.1966, 250 F.Supp. 351.

§ 154. National Mediation Board—Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal

First. The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. Each member of the Mediation Board in office on January 1, 1965, shall be deemed to have been appointed for a term of office which shall expire on July 1 of the year his term would have otherwise expired. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Chairman; principal office; delegation of powers; oaths; seal; report

Second. The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

Appointment of experts and other employees; salaries of employees; expenditures

Third. The Mediation Board may (1) subject to the civil service laws, appoint such experts and assistants to act in a confidential capacity and such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 153 of this title, and boards of arbitration, in accordance with the provisions of this section and sections 153 and 157 of this title, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Delegation of powers and duties

Fourth. The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this chapter or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or ref-

erence. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, [and] such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Transfer of officers and employees of Board of Mediation; transfer of appropriation

Fifth. All officers and employees of the Board of Mediation (except the members thereof, whose offices are abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Interpretation of agreement

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter.

When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement

of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. Arbitration—Submission of controversy to arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151–156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Manner of selecting board of arbitration

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Board of arbitration; organization; compensation; procedure—(a) Notice of selection or failure to select arbitrators

Third. When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the

hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however*, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) Compensation of assistants to board of arbitration; expenses; quarters

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; fees

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the Board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration.

§ 159. Award and judgment thereon; effect of chapter on individual employee—Filing of award

First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter

judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Effect of partial invalidity of award

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Appeal; record

Fifth. At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Finality of decision of court of appeals

Sixth. The determination of said court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Judgment where petitioner's contentions are sustained

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Duty of employee to render service without consent; right to quit

Eighth. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

§ 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the Resident, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

§ 161. Effect of partial invalidity of chapter

If any section, subsection, sentence, clause, or phrase of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter. All Acts or parts of Acts inconsistent with the provisions of this chapter are repealed.

§ 162. Appropriation

There is authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this chapter.

§ 163. Repeal of prior legislation; exception

Chapters 6 and 7 of this title, providing for mediation, conciliation, and arbitration, and all Acts and parts of Acts in conflict with the provisions of this chapter are repealed, except that the members, secretary, officers, employees, and agents of the Railroad Labor Board, in office on May 20, 1926, shall receive their salaries for a period of 30 days from such date, in the same manner as though this chapter had not been passed.

§ 164. Repealed. Oct. 10, 1940, c. 851, § 4, 54 Stat. 1111

CARRIERS BY AIR

§ 181. Application of sections 151 to 152 and 154 to 163 to carriers by air

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

May 20, 1926, c. 347, § 201, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

§ 182. Same; duties, penalties, benefits, and privileges

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

May 20, 1926, c. 347, § 202, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

§ 183. Disputes within jurisdiction of Mediation Board

The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a). A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under sections 181 to 188 of this title in the same manner and to the same extent as are the disputes covered by section 155 of this title. May 20, 1926, c. 347, § 203, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes: but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 to 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151 to 163 and 181 to 188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181 to 188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

§ 185. National Air Transport Adjustment Board

When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of sections 151 to 163 and 181 to 188 of this title, to select and designate four representatives who shall constitute a board which shall be known as the "National Air Transport Adjustment Board." Two members of said National Air Transport Adjustment Board shall be selected by said carriers by air and two members by the said labor organizations of the employees, within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by section 153 of this title for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceedings, in the manner prescribed in section 153 of this title. Vacancies in membership or office shall be filled, members shall be appointed in case of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title. The powers and duties prescribed and established by the provisions of section 153 of this title with reference to the National Railroad Adjustment Board and the several divisions thereof are conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjust-

ment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of sections 181 to 188 of this title. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

§ 186. Pending cases before Labor Relations Board transferred to Mediation Board

Codification. Section, Act May 20, 1926, c. 347, § 206, as added Apr. 10, 1936, c. 166, 49 Stat. 1191, which transferred certain pending cases before the National Labor Relations Board to the Mediation Board, is omitted as executed.

§ 187. Separability clause

If any provision of sections 181 to 188 of this title or application thereof to any person or circumstance is held invalid, the remainder of such sections and the application of such provision to other persons or circumstances shall not be affected thereby.

May 20, 1926, c. 347, § 207, as added Apr. 10, 1936, c. 166, 49 Stat. 1191.

Historical Note

References in Text. Section 186 of this title, included within the reference to sections 181 to 188 of this title, has been omitted as executed.

§ 188. Appropriation authorized

There is authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of sections 181 to 187 of this title.

May 20, 1926, c. 347, § 208, as added Apr. 10, 1936, c. 166, 49 Stat. 1191.

APPENDIX F

SUBCHAPTER I—GENERAL PROVISIONS

§ 141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

June 23, 1947, c. 120, § 1, 61 Stat. 136.

§ 142. Definitions

When used in this chapter—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter.

June 23, 1947, c. 120, Title V, § 501, 61 Stat. 161.

SUBCHAPTER II—NATIONAL LABOR RELATIONS

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when

they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

SUBCHAPTER III—CONCILIATION OF LABOR DISPUTES; NATIONAL EMERGENCIES

§ 171. Declaration of purpose and policy

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

June 23, 1947, c. 120, Title II, § 201, 61 Stat. 152.

§ 172. Federal Mediation and Conciliation Service

Creation; appointment of Director

(a) There is created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after June 23, 1947, such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment.

Appointment of officers and employees; expenditures for supplies, facilities, and services

(b) The Director is authorized, subject to the civil service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, and may, without regard to the provisions of the civil service laws, appoint such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

Principal and regional offices; delegation of authority by Director; annual report to Congress

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this chapter to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

Transfer of all mediation and conciliation services to Service; effective date; pending proceedings unaffected

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 51 of this title, and all functions of the United States Conciliation Service under any other law are transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after June 23, 1947. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

June 23, 1947, c. 120, Title II, § 202, 61 Stat. 153; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.

§ 173. Functions of Service

Settlement of disputes through conciliation and mediation

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

Settlement of disputes by other means upon failure of conciliation

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without

resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this chapter.

Use of conciliation and mediation services as last resort

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

§ 174. Co-equal obligations of employees, their representatives, and management to minimize labor disputes

(a) [1] In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this chapter for the purpose of aiding in a settlement of the dispute.

June 23, 1947, c. 120, Title II, § 204, 61 Stat. 154.

[1] Section was enacted without a subsec. (b).

§ 182. Exemption of Railway Labor Act from subchapter

The provisions of this subchapter shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

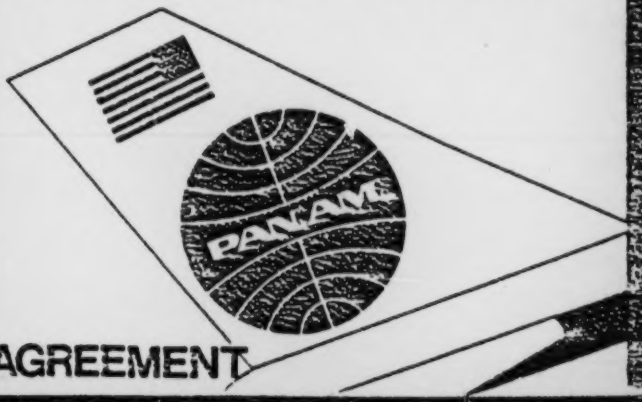
June 23, 1947, c. 120, Title II, § 212, 61 Stat. 156.

(THIS PAGE IS BLANK)

APPENDIX G

PAN AMERICAN WORLD AIRWAYS, INC.

PORT STEWARDS
AND
SENIOR PORT STEWARDS



AGREEMENT

TRANSPORT WORKERS UNION
OF AMERICA, AFL/CIO

EFFECTIVE NOVEMBER 1, 1977

BEST AVAILABLE COPY

TABLE OF CONTENTS

ARTICLE	SUBJECT	PAGE
	Preamble	1
1	Purpose of Agreement	2
2	Recognition	2
3	Working Week	2
4	Overtime Compensation	4
5	Emergency Work	6
6	Holidays	7
7	Vacations	9
8	Seniority	11
9	Classifications and Promotions	14
10	Transfers	15
11	Leave of Absence	16
12	Military Leave — Retention of Seniority	17
13	Termination of Employment	18
14	Paid Sick Leave	18
15	General	22
16	Bulletin Boards	24
17	Equal Treatment	24
18	General Benefits	25
19	No Strike — No Lockout	25
20	Management Clause	25
21	Discipline and Discharge	26
22	Adjustment of Grievances	26
23	Board of Adjustment	28
24	Meal Periods	28
25	Absence from Duty	29
26	Foreign Station Assignment	29
27	Physical Examinations	30
28	Missing, Internment, Prisoner or Hostage of War	31
29	Union Shop Agreement	32
30	Severance Allowance	39
31	Bomb Scare/Hijack Coverage	42
32	Mutual Agreement	43
33	Safety	43
34	Duration of Agreement	47

TABLE OF CONTENTS (Cont'd.)

	APPENDICES	PAGE
Appendix A	Wage Rates and Administration	50
Appendix B	Adjustment Board Agreement.	57
Appendix C	Meal Allowance	63
Appendix D	Line Station Special Increments	64
Appendix E	Temporary Assignment — Reimbursements	65
Appendix F	Staffing — Line Stations	66
Appendix G	Staffing — IAD, BAL, PHL	67
Appendix H	Staffing — BOS	68
Appendix I	Base Vacancy Preferences	69
Appendix J	Temporary Employment — SEA	72
Appendix K	Commissary Employees — GUM	73
Appendix L	Union Leaves of Absence	75
Appendix M	Disciplinary Action Records	76
Appendix N	Free/Reduced Rate Transportation . .	77
Appendix O	Merger Letter	78
Appendix P	Port Stewards — Guam	80
Appendix Q	System Displacement Program	82
Appendix R	Chicago Base.	84
Appendix S	Training	85
Appendix T	Vacation Computation, Union L.O.A.	86

TABLE OF CONTENTS (Cont'd.)

	SUPPLEMENTS	PAGE
Supplement I	Group Health Care Insurance (Active Employees)	87
Supplement II	Group Health Care Insurance (Retired Employees)	88
Supplement III	Group Life Insurance (Active Employees)	90
Supplement IV	Pension Plan Amendments	91

AGREEMENT
between
PAN AMERICAN WORLD AIRWAYS, INC.
and
TRANSPORT WORKERS UNION OF AMERICA,
AFL/CIO
Representing
PORT STEWARDS
and
SENIOR PORT STEWARDS

PREAMBLE:

*A-S THIS AGREEMENT is entered into this 29th day of April 1978 by and between Pan American World Airways, Inc. (hereinafter sometimes referred to as the "Company") and the Transport Workers Union of America, AFL/CIO (hereinafter sometimes referred to as the "Union") as representative of the Port Stewards.

---

*Language of paragraph or article result of:

A — Agreement effective January 1, 1947
B — Agreement effective July 1, 1948
C — Agreement effective September 30, 1949
D — Agreement effective March 26, 1951
E — Agreement effective April 14, 1952
F — Agreement effective March 1, 1953
G — Agreement effective June 8, 1954
H — Agreement effective September 10, 1955
I — Agreement effective October 1, 1957
J — Agreement effective March 4, 1959
K — Agreement dated December 15, 1960
L — Agreement effective October 5, 1962
M — Agreement effective September 10, 1964
N — Agreement effective December 23, 1966
O — Agreement effective April 19, 1969
P — Agreement effective June 4, 1971
Q — Agreement effective August 1, 1973
R — Contract Amendments effective November 1, 1975
S — Agreement effective November 1, 1977

Article 1

PURPOSE OF AGREEMENT

B THIS AGREEMENT is entered into, under the terms of the Railway Labor Act, as amended, in the mutual interest of the present and future employees, and of the Company, to promote the safety and continuity of air transportation, to further the efficiency and economy of operations, and to stabilize employment under reasonable hours, rates of pay, and working conditions. It is recognized by this Agreement to be the duty of the Company and the employees to cooperate fully, both individually and collectively, for the advancement of said conditions.

Article 2

RECOGNITION

A,B,H The Transport Workers Union of America, AFL/CIO, has furnished evidence that, in conformity with the provisions of the Railway Labor Act, as amended, it has been duly designated as the representative of the Port Stewards and Senior Port Stewards employed by the Company and in their behalf to negotiate and conclude an Agreement with the Company covering rates of pay, rules and working conditions. The Company recognizes the Union as the exclusive and sole collective bargaining agency for all personnel enumerated herein.

Except in emergencies, Supervisors will not do productive work.

Article 13

TERMINATION OF EMPLOYMENT

B (a) Employees shall give the Company two (2) weeks' notice of resignation in writing.

B (b) Employees laid off through no fault of their own shall be granted two (2) weeks' notice in writing.

B (c) This requirement of notice, set forth in (b) above, shall not apply to a layoff caused by an Act of God, or by a strike of the employees of the Company called without giving the notice required by the Railway Labor Act.

B (d) An employee who resigns in compliance with this Article or whose employment is terminated by the Company shall, upon request, be given factual references in writing for the period of his employment with the Company.

Article 21

DISCIPLINE AND DISCHARGE

B (a) It is understood that the Company has the right to discipline or discharge an employee for incompetency, disobedience, dishonesty, disorderly conduct, negligence, absenteeism or any just and sufficient cause.

B (b) During the probationary period an employee may be discharged or disciplined at the Company's option without recourse to the Grievance Procedure.

B (c) An employee who has passed his probationary period may appeal a disciplinary or discharge action in accordance with Article 22.

P (d) All letters of discipline (warning or suspension) will be removed after a period of two (2) years from date of issuance.

Article 22

ADJUSTMENT OF GRIEVANCES

B (a) An employee who believes that he has been unjustly dealt with or that any provision of this Agreement has not been properly applied or interpreted may present his grievance in person, or through his representative, within five (5) days to his Supervisor who shall evaluate the grievance and render his decision within five (5) days thereafter.

B (b) If the grievance is still not settled, it may be submitted within five days (5) to the person designated by the Company who shall render a decision within five (5) days.

B (c) If the grievance is still unsettled, it may be submitted in writing to the appropriate Adjustment Board within ten (10) days.

B (d) All submissions and decisions shall be set forth in writing.

B,S (e) An employee and/or accredited Union Representative who, during his scheduled working hours, meets with Company officials on grievances or other pertinent Union business shall be paid at his regular hourly rates for time so spent.

A (f) The Union shall be notified of all grievance meetings and may, if it desires, have a representative present.

(g) The Company shall provide transportation over its regular routes to Union representatives when required in connection with the handling of business deemed essential by the Company and Union.

B (h) An International or Local Officer of the Union who believes that any provision of this Agreement has not been or is not being properly applied or interpreted shall have the right within ten (10) days after such alleged misapplication or misinterpretation to protest such violation to the appropriate Company Representative who shall evaluate such protest and render a decision in writing within fifteen (15) days.

S An International or Local Officer of the Union or an employee who believes that any provision of the Benefit Supplements has not been, or is not being properly applied or interpreted shall have the right to protest such alleged misapplication or misinterpretation, in writing, directly to the appropriate Employee Reations/Labor Relations Officer. Such Officer shall evaluate the protest and render a decision, in writing, within fifteen (15) days.

B (i) If no settlement is reached under Paragraph (h) of this Article, an appeal may be made in writing within thirty (30) days to the appropriate Adjustment Board established under Article 23 of this Agreement.

Article 23

BOARD OF ADJUSTMENT

B.E Any grievance not adjusted in the manner provided for in Article 22 above or any dispute between the Company and the Union or any employee or employees governed by this Agreement involving a violation of the Railway Labor Act or the interpretation or application of this Agreement shall be referred to the appropriate Adjustment Board established by the Adjustment Board Agreement between Pan American World Airways, Inc. and Transport Workers Union of America, effective May 1, 1954, a copy of which is attached hereto and made a part hereof.

FILED
JUN 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

GEORGE PUCHERT,
Appellee.

On Appeal From The Supreme Court of Hawaii

MOTION TO DISMISS OR AFFIRM

JAN T. CHILTON
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
Telephone: (415) 398-3344
Attorney for Appellee
George Puchert

Of Counsel:
KURT W. MELCHIOR
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
Telephone: (415) 398-3344

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

35pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Hawaii Revised Statutes Section 378-32 prohibits employers from suspending or discharging employees "solely because the employee has suffered a work injury" compensable under Hawaii's workers' compensation law. May Hawaii enforce this law against an air carrier despite a claim that it is preempted by the Railway Labor Act (45 U.S.C. § 151 et seq.)?

2. Hawaii Revised Statutes Sections 378-33—378-37 provide an administrative remedy before the Hawaii Department of Labor and Industrial Relations for employees who have been suspended or discharged in violation of section 378-32. May an employee who is covered by the Railway Labor Act invoke this state administrative remedy to enforce his rights under state law without exhausting his arbitral remedies under the Railway Labor Act (45 U.S.C. §§ 153, 184)?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Summary of Argument	1
Argument	4
1. The Railway Labor Act Does Not Preempt Hawaii Revised Statutes Section 378-32	4
a. The RLA Does Not Protect or Prohibit Discriminatory Discharges	4
b. Protecting Injured Workers Is A Matter Overriding State Concern	6
c. There Is No Risk Of Substantial Interference With RLA Administration	7
2. Puchert Was Not Required to Exhaust Arbitral Remedies	10
Conclusion	17
Supplementary Appendix	A-1

TABLE OF AUTHORITIES

Cases

Page

Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C.Cir. 1980) 13

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11, 13, 14, 15, 16

Andrews v. Louisville & N. R.R., 406 U.S. 320 (1972) 3, 11-12, 14

Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) 11, 13, 15, 16

Beers v. Southern Pac. Transp. Co., 703 F.2d 425 (9th Cir. 1983) 4

Choate v. Louisville & N. R.R., 715 F.2d 369 (7th Cir. 1983) 4

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) 2, 3, 5

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) 2, 4, 5, 8, 9

Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1979) 7

Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) 8, 14

Harris v. Norfolk & W. R., 616 F.2d 377 (8th Cir. 1969) 13

Hunter v. Atchison, T. & S. F. R.R., 171 F.2d 594 (7th Cir. 1948), cert. den., 337 U.S. 916 (1949) 9

International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) 8

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), cert. den., ... U.S. ....., 104 S.Ct. 1000 (1984) 4-5

Table of Authorities

Cases

Page

Johnson v. American Airlines, Inc., 487 F.Supp. 1343 (N.D.Tex. 1980) 13

Kidder v. Eastern Air Lines, Inc., 469 F.Supp. 1060 (S.D.Fla. 1978) 12, 14

McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265 (1958) 3, 13

Messenger v. Volkswagen of America, Inc., ... F.Supp. ....., No. 82-2601 (S.D.W.Va. May 18, 1984) 3, 7, 15

Moe v. Eastern Air Lines, Inc., 246 F.2d 215 (5th Cir. 1957), cert. den., 357 U.S. 936 (1958) 13

New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) 8

Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969) 13

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 2, 3, 6, 7, 8, 14, 15

Republic Steel Corp. v. Maddox, 379 U.S. 652 (1965) .. 14

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) 4, 8, 9

United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 597 (1960) 9

United Steelworkers v. Union R., 648 F.2d 905 (3d Cir. 1981) 9

Vaughn v. Pacific Northwest Bell Telephone Co., 289 Or. 73, 611 P.2d 281 (1980) 3, 7

Table of Authorities

Statutes

Page

Federal:

Civil Rights Act of 1964, Title VII 10

National Labor Relations Act 3, 4, 13, 14

Railway Labor Act .....passim

United States Code:

Title 33:

Section 901 6

Section 948a 7

Title 45:

Section 51 6

Section 151a 8

Section 152 5

Section 153 ..... 2, 8

Section 184 ..... 2, 8

Title 46:

Section 688 6

State:

Hawaii Revised Statutes:

Section 378-32 .....passim

Other Authorities

Larson's Workmen's Compensation Law (1982):

Vol. 1, §§ 5.20, 5.30 6

Vol. 2A, § 68.36(a) 6, 7

No. 83-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

GEORGE PUCHERT,
Appellee.

On Appeal From The Supreme Court of Hawaii

MOTION TO DISMISS OR AFFIRM

SUMMARY OF ARGUMENT

Appellee George Puchert was a port steward for appellant Pan American World Airways, Inc. (Pan Am). He was injured on the job and received compensation under Haiwaii's workers' compensation law. Pan Am fired him because of his injury.

Puchert filed a claim in the Hawaii Department of Labor and Industrial Relations to enforce his state law right not to be discharged because of work injuries. His claim arises entirely from this state law which is basic to Hawaii's workers' compensation scheme.

Rejecting arguments Pan Am raised for the first time in that court, the Hawaii Supreme Court correctly determined that Hawaii's law was not preempted by the Railway Labor Act (RLA). It also properly held that Puchert

need not exhaust arbitral remedies under the RLA before proceeding to enforce his state law rights in the Hawaii Department of Labor and Industrial Relations.

Federal labor laws do not preempt all state regulation of the employer-employee relationship. A state law affecting that relationship will not be preempted if (1) it does not regulate conduct even arguably protected or prohibited by federal labor law, (2) it addresses a matter of overriding state interest, and (3) it poses no substantial risk of interference with effective administration of national labor policy. *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 298 (1977).

Hawaii's statute forbidding discrimination against injured workers meets these criteria. The RLA does not protect or prohibit discrimination in employment. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.,* 372 U.S. 714, 724 (1963). "Workmen's compensation is preeminently a matter of state concern." *Peabody Galion v. Dollar,* 666 F.2d 1309, 1317 (10th Cir. 1981). Hawaii's statute leaves employers generally free to deal with their employees as they choose; it prohibits only "the exercise of an underhanded means of firing employees who have elected to utilize workmen's compensation." *Id.* at 1317. The RLA does not preempt Hawaii Revised Statutes Section 378-32.

Puchert's claim that Pan Am fired him in violation of section 378-32 is not a "minor dispute" which must be arbitrated under the RLA. The RLA's mandatory arbitration provisions (45 U.S.C. §§ 153, 184) apply only to claims based upon rights arising from collective bargaining agree-

ments. *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 324 (1972). An employee is not required to arbitrate a claim based on a statutory right. This is true whether the claim arises under state or federal law. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., supra; McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 268-269 (1958).

These preemption and exhaustion of arbitral remedies principles are no different under the RLA than under the National Labor Relations Act (NLRA). Three recent decisions have held that the NLRA does not preempt state statutes like Hawaii Revised Statute Section 378-32 and that workers fired in violation of such statutes may pursue state remedies against such violations without exhausting arbitral remedies. *Peabody Galion v. Dollar, supra,* 666 F.2d 1309; *Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 611 P.2d 281 (1980); *Messenger v. Volkswagen of America, Inc.*, ... F.Supp. ....., No. 82-2601 (S.D. W.Va. May 18, 1984).

Those decisions and the Hawaii Supreme Court's ruling in this case correctly apply well-established rules of federal labor law. Congress did not intend the NLRA or the RLA to prevent states from protecting workers against being fired because they were injured on the job. The Hawaii Supreme Court's decision is a correct application of established law. It raises no substantial federal question warranting this Court's review. The appeal should be dismissed, or the Hawaii Supreme Court's judgment should be affirmed.

ARGUMENT

1. The Railway Labor Act Does Not Preempt Hawaii Revised Statutes Section 378-32

In determining whether federal labor laws preempt state law, this Court applies a flexible test which depends "upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of allowing the state law to be enforced. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 188-189 (1978).

State laws are not preempted if (1) they do not regulate conduct which is arguably or in fact protected or prohibited by federal labor laws, (2) they address a matter of "overriding state interest" which is "deeply rooted in local feeling and responsibility," and (3) there is little risk that they will interfere with the effective administration of national labor policy. *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 298.

Contrary to Pan Am's unsupported argument, Juris. Statement, 37-38, 40, this same test applies to preemption by the RLA as well as to preemption by the NLRA. *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045, 1052 & n. 9 (7th Cir. 1983), cert. den., ... U.S. ....., 104 S.Ct. 1000 (1984); *Choate v. Louisville & N. R.R.,* 715 F.2d 369, 371 (7th Cir. 1983); *Beers v. Southern Pac. Transp. Co.,* 703 F.2d 425, 428-429 (9th Cir. 1983). As the Seventh Circuit recently put it:

> The *Colorado Anti-Discrimination* [*Comm'n v. Continental Air Lines, Inc.,* 374 U.S. 714, 724] case illustrates a mode of analysis consistent with *Farmer* and *Sears* and demonstrates that not every state dispute

> involving a carrier subject to the RLA is preempted by that statute.

Jackson v. Consolidated Rail Corp., supra, 717 F.2d at 1052 n. 9.

As will be shown below, Hawaii Revised Statutes Section 378-32 meets the three *Farmer* criteria. Therefore, the Hawaii Supreme Court correctly concluded it was not preempted by the RLA.

a. The RLA Does Not Protect or Prohibit Discriminatory Discharges

Hawaii Revised Statute Section 378-32 prohibits employers from suspending or discharging an employee "[s]olely because the employee has suffered a work injury." App. 22. The RLA does not even arguably protect or prohibit such discriminatory suspensions or discharges.

As this Court held in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., supra,* 372 U.S. at 724:

> No provision in the [RLA] even mentions discrimination in hiring. . . . Nothing in the Railway Labor Act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act.

Fn. omitted.

The *Colorado Anti-Discrimination* case dealt with racial discrimination, but its holding applies here. Section 2 of the RLA (45 U.S.C. § 152), the only section of the RLA which protects or prohibits employer or employee conduct,

says nothing about discrimination against injured workers, just as it says nothing about racial discrimination. Neither form of discrimination is even arguably protected or prohibited by the RLA.

b. Protecting Injured Workers Is A Matter Of Overriding State Concern

With a few specific exceptions governed by federal law, e.g., 33 U.S.C. § 901 et seq.; 45 U.S.C. § 51 et seq.; 46 U.S.C. § 688, compensation for injured workers has long been a matter of state regulation and concern. Every state has a worker's compensation law. 1 Larson's Workmen's Compensation Law, §§ 5.20, 5.30, pp. 37-39 (1982). Most of those laws have been in effect for more than 50 years. *Ibid.* As the Tenth Circuit has said, "[w]orkmen's compensation is preeminently a matter of state concern." *Peabody Galion v. Dollar, supra,* 666 F.2d at 1317.

Hawaii Revised Statutes Section 378-32 partakes fully of this local concern. It prohibits specific acts of discrimination against injured workers in order to prevent employers from circumventing Hawaii's worker's compensation act and in order to ensure that workers are not deterred from seeking benefits under that act.

> If . . . an employer could with impunity coerce an employee into forgoing his rights, the employer could unilaterally defy and destroy the function of the [worker's compensation] act, and at the same time relieve himself of an obligation deliberately imposed on him by the legislature.

2A Larson's Workmen's Compensation Law, § 68.36(a), p. 13-94 (1982).

Recognizing this fact, most other states have adopted statutes or rules of law similar to Hawaii's Section 378-32. *Id.* at pp. 13-85—13-92. Congress, too, has seen the need for such a rule in connection with the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 948a. Interestingly, the first case on point was recent. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1979). As Larson comments:

> It is odd that such a decision was so long in coming. Perhaps the explanation may be in the fact that the conduct involved is so contemptible that few modern employers would be willing to risk the opprobrium of being found in such a position.

2A Larson's Workmen's Compensation Law, § 68.36(a), p. 13-93 (1982).

As the Oregon Supreme Court has held, statutes like Hawaii Revised Statutes Section 378-32 are matters of particular state concern and responsibility. They are necessary to vindicate the state's "substantial interest in protecting the integrity of its workers' compensation system." *Vaughn v. Pacific Northwest Bell Telephone Co., supra,* 611 P.2d at 287.

c. There Is No Risk Of Substantial Interference With RLA Administration

The only courts which have considered the question have concluded that statutes like Section 378-32 do not pose a substantial risk of interfering with the effective administration of the NLRA. *Peabody Galion v. Dollar, supra,* 666 F.2d at 1317; *Vaughn v. Pacific Northwest Bell Telephone Co., supra,* 611 P.2d at 287; *Messenger v. Volkswagen of America, Inc., supra,* ..... F.Supp. at ..... The RLA's special features do not require a different result.

Section 378-32 is a general regulation, not a law designed to regulate labor relations. It is therefore "less likely to generate rules or remedies which conflict with federal labor policy than the invocation of a special remedy under a state labor relations law." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, supra,* 436 U.S. at 197 n. 27.

Section 378-32 guarantees rights to individual workers. It "has nothing whatsoever to do with" union organization or collective bargaining, *Peabody Galion v. Dollar, supra,* 666 F.2d at 1316, which are the primary concerns of the RLA, *International Ass'n of Machinists v. Street,* 367 U.S. 740, 759 (1961); 45 U.S.C. § 151a. Discrimination against individual injured workers is not one of the "means of economic warfare [that Congress intended to leave free] for use during the bargaining process." *New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519, 530 (1979).

Hawaii's statute does not tell employers whom to hire, retain or fire. It merely proscribes one motive or reason for suspending or firing an employee. Like the tort discussed in *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 305, Section 378-32 prohibits an employer from firing workers in a particular manner or for a particular motive. It does not prohibit discharges as such. See *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367, 1374 (9th Cir. 1984).

Hawaii's statute poses no substantial risk of interference with the RLA's system of mandatory arbitration for "minor disputes." 45 U.S.C., §§ 153, 184. That arbitration system is designed to handle claims arising from alleged

breaches of collective bargaining agreements, not violations of state law. See pp. 10-16, below. An RLA board of adjustment "may of course look for guidance from many sources, yet [its] award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960); *United Steelworkers v. Union R.*, 648 F.2d 905, 911 (3d Cir. 1981); *Hunter v. Atchison, T. & S. F. R.R.*, 171 F.2d 594, 598-599 (7th Cir. 1948), cert. den., 337 U.S. 916 (1949). Boards of adjustment do not enforce state workers' compensation laws.

By contrast, in a state administrative proceeding to enforce Section 378-32, the sole question will be whether an employer violated that state law by suspending or firing a worker because of his work injury. This different focus of the state administrative proceeding assures that it will not interfere with RLA arbitration. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, supra,* 436 U.S. at 197; *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 304.

Pan Am's collective bargaining agreement with Puchert's union recognizes these principles. The agreement contains no provision regarding discrimination against injured employees, requiring only that Pan Am have "just and sufficient" cause for termination. App. 76. The agreement limits Pan Am-union boards of adjustment to determining *only* those disputes "growing out of grievances involving interpretation or application of [the collective bargaining] Agreements." App. 78; Supp. App. 7. The boards of adjustment would, therefore, be unable to hear Puchert's claim of discrimination in violation of Section 378-32.

Most significantly, Pan Am and Puchert's union have already agreed that state law shall supersede their agreement. Article 15(a) of the agreement states:

> Provisions of this Agreement will apply only to the extent that they do not conflict with local laws of any country, state, territory or possession.

Supp. App. 5. Given this provision, it is hardly surprising that Pan Am has never suggested how Puchert's pursuing his state administrative remedy will interfere in any concrete way with RLA arbitration under the Pan Am-union contract.

There is no substantial danger of such interference. Hawaii's statute addresses a matter of overriding state concern. It is necessary to protect the integrity of Hawaii's worker's compensation law. The statute does not regulate conduct even arguably protected or prohibited by the RLA. The Hawaii Supeme Court correctly concluded that Section 378-32 is not preempted.

2. Puchert Was Not Required To Exhaust Arbitral Remedies

Puchert was not required to pursue arbitration under the RLA before proceeding in the Hawaii Department of Labor and Industrial Relations on his claim that Pan Am had fired him in violation of Section 378-32. The RLA's mandatory system of arbitration for "minor disputes" applies only to claims based on rights arising from a collective bargaining agreement. That arbitration system was not designed to, and does not, handle claims based on state statutory rights.

This Court held in *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 737 (1981) that:

> While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

This Court made the same distinction in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974), in holding that an employee could sue under Title VII of the Civil Rights Act of 1964 even though he had earlier lost an arbitration arising from the same incident:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Pan Am fails to note this crucial distinction and consequently argues that this case is governed by *Andrews v. Louisville & N. R.R., supra,* 406 U.S. 320. Juris. Statement, 17-22. *Andrews,* however, is inapposite. Andrews' wrongful discharge suit sought to vindicate rights arising from a collective bargaining agreement, not from a state or federal law. As this Court observed:

> Here it is conceded by all that the only source of plaintiff's right not to be discharged . . . is the collective bargaining agreement between the employer and the

> union. . . . The fact that petitioner intends hereafter to seek employment elsewhere does not make his present claim against his employer any less a dispute as to the interpretation of a collective-bargaining agreement. His claim is therefore subject to the [RLA's] requirement that it be submitted to the Board for adjustment.

406 U.S. at 324.

Puchert's claim, by contrast, arises under Hawaii statutes, not Pan Am's collective bargaining agreement. The Hawaii Supreme Court correctly found that:

> Puchert complains of a violation of his right not to be discharged from his employment solely because he suffered from a work related injury compensable under the state's worker's compensation law. This right finds its source not in the collective bargaining agreement between Pan Am and Puchert's union, but in the statute. [Citation.]

App. 7; contra, Juris. Statement, 22.

Since Puchert's right not to be discharged arises from Hawaii Revised Statutes Section 378-32, not the collective bargaining agreement, *Andrews'* holding and reasoning are inapplicable to this case. *Kidder v. Eastern Air Lines, Inc.*, 469 F.Supp. 1060, 1063 (S.D.Fla. 1978).[1]

---

[1]Hawaii Revised Statutes Section 378-32 guarantees injured workers the right to be free from retaliatory discharges regardless of any agreement the workers or their union may have with the employer. Consequently, the statute does not merely "call a minor dispute by another name" as Pan Am suggests. Juris. Statement, 43. For the same reason, the decisions Pan Am cites at pages 20-22 of its Jurisdiction Statement are inapposite. In each of them, the employee tried to plead a state contract or tort claim, but his rights in each case flowed from the collective bargaining agreement, not some independent source such as section 378-32.

Pan Am also argues that the distinction noted in *Barrentine* and *Alexander* between contract and statutory rights applies only to arbitration under the NLRA, not arbitration under the RLA. Juris. Statement, 34-40. Pan Am is wrong. In *McKinney v. Missouri-Kansas-Texas R.R., supra,* 357 U.S. at 268-269, this Court made the same distinction in an RLA case, stating:

> The Court of Appeals correctly held that petitioner was not obliged, before bringing suit in the District Court under § 9(d) of the [Universal Military Training and Service] Act [citation], to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board. [Citation.] The rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement. . . . Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.

Numerous lower courts have also held that employees asserting statutory claims need not proceed to arbitration under the RLA. *Air Line Pilots Ass'n v. Northwest Airlines, Inc.,* 627 F.2d 272, 277-278 (D.C.Cir. 1980) (ERISA claims not requiring interpretation of the collective bargaining agreement); *Harris v. Norfolk & W. R.,* 616 F.2d 377, 379 (8th Cir. 1969) (Title VII claims); *Norman v. Missouri Pac. R.R.,* 414 F.2d 73, 79-83 (8th Cir. 1969) (Title VII claims); *Moe v. Eastern Air Lines, Inc.,* 246 F.2d 215, 218 (5th Cir. 1957), cert. den., 357 U.S. 936 (1958) (Veteran's reemployment rights claim); *Johnson v. American Airlines, Inc.,* 487 F.Supp. 1343 (N.D.Tex.

1980) (ADEA claims); *Kidder v. Eastern Air Lines, Inc., supra,* 469 F.Supp. at 1062-1065 (Veteran's reemployment rights claims). There is no reason to treat RLA arbitration any different from NLRA arbitration on this point. Once an employer and union have agreed to arbitration under the NLRA, an employee is just as firmly required to pursue arbitration under that act as he is under the RLA. See *Andrews v. Louisville & N. R.R., supra,* 406 U.S. at 323; *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965).

Finally, Pan Am is wrong in contending that the employee may not pursue a non-arbitration remedy if his claim is based on a state statute rather than a federal one. Juris. Statement, 34-39. Both the Ninth and Tenth Circuits have recently rejected that argument. *Garibaldi v. Lucky Food Stores, Inc., supra,* 726 F.2d at 1375-1376; *Peabody Galion v. Dollar, supra,* 666 F.2d at 1321. Explaining why *Alexander v. Gardner-Denver Co., supra,* applies to claims arising under state law, the Ninth Circuit noted:

> The fact that Alexander's additional remedy was one created by *federal* rather than *state* law does not diminish the force of the argument. First, the focus of *Alexander* was the preclusive effect of the arbitration, not the preemptive effect of federal law—a supremacy clause issue. Second, the Supreme Court held in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.* [citation] that a discrimination action under Colorado law was not preempted by the RLA.

Garibaldi v. Lucky Food Stores, Inc., supra, 726 F.2d at 1375 n. 13.

Each of the reasons supporting the *Alexander* and *Barrentine* decisions applies with equal force when the employee's claim is based on state, not federal, law.

Arbitrators are experts in the "law of the shop, not the law of the land." *Barrentine v. Arkansas-Best Freight Sys., supra,* 450 U.S. at 743. Arbitrators may not be conversant with federal law and policy, *ibid.,* and they are even less likely to be familiar with state laws and policy.

Arbitrators are limited to interpreting and enforcing the collective bargaining agreement. *Id.* at 743-744; *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 53. They may be unable to enforce state law. Also, arbitrators are required to effectuate the intent of the employer and union, not the state legislature's intent. Their decisions may, therefore, be inimical to the public policies underlying state statutes. See *Barrentine v. Arkansas-Best Freight Sys., supra,* 450 U.S. at 744; *Peabody Galion v. Dollar, supra,* 666 F.2d at 1322. Arbitration also differs from state law remedies in the evidentiary rules applied and the relief which may be ordered. *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 57-58; *Peabody Galion v. Dollar, supra,* 666 F.2d at 1322-1323; *Messenger v. Volkswagen of America, Inc., supra,* ..... F.Supp. at .....

Of "further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented." *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 58 n. 19. A union may legitimately subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit. *Ibid.; Barrentine v. Arkansas-Best Freight Sys., supra,* 450 U.S. at 742. The union's legitimate concern with the interests

of all bargaining unit employees works at cross purposes with Hawaii Revised Statutes Section 378-32 which guarantees rights to individual workers regardless of the effect on other employees. Requiring arbitration of claims under section 378-32 would in effect give unions a veto power over enforcement of rights the Hawaii legislature has guaranteed each employee. Congress surely never intended such a drastic intrusion on the states' powers to enforce their laws.

The Hawaii Supreme Court correctly applied *Alexander* and *Barrentine,* holding that Puchert need not exhaust his arbitral remedies under the RLA before proceeding in the Hawaii Department of Labor and Industrial Relations on his claim that Pan Am discharged him in violation of Hawaii Revised Statutes Section 378-32.

CONCLUSION

The Hawaii Supreme Court correctly concluded that the RLA does not preempt Hawaii Revised Statutes Section 378-32 and that Puchert may proceed with his state administrative remedy against Pan Am for violation of that section; he need not exhaust arbitral remedies under the RLA.

Pan Am's appeal presents no substantial question of federal law for decision by this Court. This Court has already established the governing principles in *Colorado Anti-Discrimination Comm'n, Farmer* and *Sears,* and in *McKinney, Alexander* and *Barrentine.* The Hawaii Supreme Court correctly applied those principles to the facts of this case. The appeal should be dismissed or summarily affirmed. *Zucht v. King,* 260 U.S. 174, 176 (1922); *Equitable Life Assur. Soc'y v. Brown,* 187 U.S. 308, 311 (1902).

Respectfully submitted,

KURT W. MELCHIOR
SEVERSON, WERSON, BERKE & MELCHIOR
A Professional Corporation
One Embarcadero Center, 25th Floor
San Francisco, CA 94111
Of Counsel

JAN T. CHILTON
One Embarcadero Center, 25th Floor
San Francisco, CA 94111
(415) 398-3344
Attorney for Appellee George Puchert

June 21, 1984

(Supplementary Appendix follows)

SUPPLEMENTARY APPENDIX*

*Puchert has been unable to obtain a copy of the 1977 collective bargaining agreement. Changes made by the 1980 collective bargaining agreement, which is reproduced here, are marked with a capital "T" in the left-hand margin. No such changes were made in the crucial provisions reproduced here or cited in the text.

TABLE OF CONTENTS

ARTICLE	SUBJECT	PAGE
	Preamble	1
1	Purpose of Agreement	2
2	Recognition	2
3	Working Week	2
4	Overtime Compensation	4
5	Emergency Work	6
6	Holidays	7
7	Vacations	8
8	Seniority	11
9	Classifications and Promotions	14
10	Transfers	15
11	Leave of Absence	16
12	Military Leave - Retention of Seniority	17
13	Termination of Employment	17
14	Paid Sick Leave	18
15	General	20
16	Bulletin Boards	22
17	Equal Treatment	22
18	General Benefits	22
19	No Strike - No Lockout	22
20	Management Clause	22
21	Discipline and Discharge	23
22	Adjustment of Grievances	23
23	Board of Adjustment	25
24	Meal Periods	25
25	Absence from Duty	26
26	Foreign Station Assignment	26
27	Physical Examinations	27
28	Missing, Internment, Prisoner or Hostage of War	28
29	Union Shop Agreement	29
30	Severance Allowance	35
31	Bomb Scare/Hijack Coverage	38
32	Mutual Agreement	39
33	Safety	39
34	Duration of Agreement	43

TABLE OF CONTENTS (Cont'd.)

APPENDIX	SUBJECT	PAGE
A	Wage Rates and Administration	45
B	Adjustment Board Agreement	51
C	Meal Allowance	57
D	Line Station Special Increments	58
E	Temporary Assignments - Reimbursements	59
F	Staffing - Line Stations	60
G	Staffing - IAD, BAL, PHL	63
H	Staffing - BOS	64
I	Base Vacancy Preferences	65
J	Temporary Employment - SEA	68
K	Commissary Employees - GUM	69
L	Union Leaves of Absence	71
M	Disciplinary Records	72
N	Free/Reduced Rate Transportation	73
O	Merger Letter	74
P	System Displacement Program	77
Q	Chicago Base	79
R	Training	80
S	Vacation Computation, Union L.O.A.	81
T	Memorandum of Agreement re: Catering	82
U	Dues Deduction	99
V	Side Agreements	100
W	Benefit Booklets	101
X	COPE	102
Y	Legal Service Plan	103

AGREEMENT

between

PAN AMERICAN WORLD AIRWAYS, INC.

and

TRANSPORT WORKERS UNION OF AMERICA, AFL/CIO

Representing

PORT STEWARDS

and

SENIOR PORT STEWARDS

PREAMBLE:

*A-T THIS AGREEMENT is entered into this 21st day of November, 1980 by and between Pan American World Airways, Inc. (hereinafter sometimes referred to as the "Company") and the Transport Workers Union of America, AFL/CIO (hereinafter sometimes referred to as the "Union") as representative of the Port Stewards.

---

* Language of paragraph or article result of:
A — Agreement effective January 1, 1947
B — Agreement effective July 1, 1948
C — Agreement effective September 30, 1949
D — Agreement effective March 26, 1951
E — Agreement effective April 14, 1952
F — Agreement effective March 1, 1953
G — Agreement effective June 8, 1954
H — Agreement effective September 10, 1955
I — Agreement effective October 1, 1957
J — Agreement effective March 4, 1959
K — Agreement dated December 15, 1960
L — Agreement effective October 5, 1962
M — Agreement effective September 10, 1964
N — Agreement effective December 23, 1966
O — Agreement effective April 19, 1969
P — Agreement effective June 4, 1971
Q — Agreement effective August 1, 1973
R — Contract Amendments effective November 1, 1975
S — Agreement effective November 1, 1977
T — Agreement effective July 1, 1980

employee's normal wage, the sick leave credit drawn shall be at such lower rate so as not to permit the employee to receive an amount in excess of his normal wage. Such credit drawn shall be computed to the nearest hour.

C 4. In meritorious cases, the employer, at his discretion, may pay disabled employees full wages or partial wages for such periods as he deems proper over and beyond his obligations referred to above.

Article 15

GENERAL

A (a) Provisions of this Agreement will apply only to the extent that they do not conflict with local laws of any country, state, territory or possession.

A (b) An employee stationed at a foreign station or on a special assignment away from his base station shall be provided with transportation according to Company practice in the event of an emergency involving the employee or his immediate family.

A An employee shall receive prompt written notice confirming orders involving a permanent change in status or compensation or placing him on a special assignment.

A Each employee and his immediate family shall be granted passes subject to the approval of the Company.

A (c) The Company shall prepare copies of this Agreement and shall give a copy to each employee.

B (d) An employee hereunder who, for a day or longer, is assigned by the Company to perform the duties and accept the responsibilities of a higher classification of work, shall be paid not less than the established rate for said classification for the time so worked.

B (e) Before the end of each shift, employees shall be allowed five (5) minutes' wash-up time.

APPENDIX B

B,F PAN AMERICAN WORLD AIRWAYS, INC.

and

TRANSPORT WORKERS UNION OF AMERICA, AFL/CIO
ADJUSTMENT BOARD AGREEMENT

Pan American World Airways, Inc. hereinafter referred to as the Company, and Transport Workers Union of America, AFL/CIO, hereinafter referred to as the Union, hereby agree as follows:

T (a) There are hereby established, pursuant to the provisions of the Railway Labor Act, as amended, the following Adjustment Boards:

System Board
Western Region Field Board
Eastern Region Field Board
Southern Region Field Board

Grievances which may be properly referred to them shall be handled by Adjustment Boards as follows:

1. Field Adjustment Boards will handle Discipline and Discharge grievances, grievances relating to the qualifications of individuals and any grievances referred to the Field Board by the System Adjustment Board for local disposition. However, no Field Board shall have jurisdiction to interpret this Agreement.

2. The System Adjustment Board will handle all other grievances.

(b) Each Board shall be composed of four (4) members; two (2) selected by the Company, and two (2) selected by the Union.

(c) The members of each Board shall continue to serve until such time as the parties selecting the representative members shall select their successors which may be done at any time except during the consideration of a case.

(d) Each Board shall have jurisdiction only over disputes between the Company and the Union or any employee or employees governed by System Agreements growing out of grievances involving interpretation or application of such Agreements. No Board shall have jurisdiction whatsoever over proposals relating to general charges in hours of work, rates of pay, rules or working conditions. Proposals relating to rates of pay, rules or working conditions shall be handled in the manner provided for in the DURATION OF AGREEMENT Sections of the respective Agreements.

(e) Each Board shall meet at the Field or System Headquarters of the Company, as the case may be, in four (4) regular sessions each year during the months of February, May, August, and November, provided that at such times there are any cases filed with or pending before the Board. The Chairman or the Vice Chairman may, if circumstances require, call a special meeting at any other time. The date on which the Boards will meet shall be established by the Chairman and the Vice Chairman. In order to eliminate any possible conflict in meeting dates, the schedule will be coordinated by the Vice President, Labor Relations for the Company and the Director of the Air Transport Division or his designee for the Union.

(f) The members of the respective Boards shall select a Chairman and Vice Chairman whose terms of office shall be one (1) year, provided, however, that the offices of Chairman and Vice Chairman shall be filled alternately by a member representing the Company and a member representing the Union, that is, when a Union member is Chairman, a Company member shall be Vice Chairman, and vice versa.

(g) The Chairman, or in his absence, the Vice Chairman, shall preside at meetings of the Board and shall have a vote on the adoption of all decisions of the Board.

(h) A dispute submitted to the Board shall be in the form of a joint submission agreed to by all parties and shall state:

1. The name of the employee or employees involved if the dispute grows out of grievances of individual employees;

2. A statement that an attempt has been made to obtain an adjustment of the dispute in the manner provided for in applicable System Agreements between the parties and that the parties have failed to reach in such manner a satisfactory adjustment;

3. A statement of the nature of the dispute and the basis for the jurisdiction of the Board of Adjustment;

4. The position or contention of the Union and of the employee or employees; and

5. The position or contention of the Company.

(i) If all parties to the dispute cannot agree on a joint submission, then and only in that event, any party to the dispute may submit the dispute by petition which shall contain all the statements required in a joint submission. In all cases where a dispute is not submitted in the form of a joint submission, the party or parties to the dispute who have not joined in the submission shall be served with a copy of the petition at least fifteen (15) days before the date set for the hearing and shall have the right within such fifteen (15)-day period to file with the Chairman of the Board a written answer thereto.

(j) Seven (7) copies of each submission or petition including all papers and exhibits in connection therewith, shall be delivered to the Chairman or Vice Chairman of the Board, who shall immediately transmit one (1) copy thereof to each member of the Board, one (1) copy to the Company and one (1) copy to the Union. Upon receiving a submission or petition, the Chairman and Vice Chairman shall set a date for hearing which shall be at the time of the next regular meeting of the Board, or if the urgency of the matter requires, then at such earlier time and place as they shall fix. The parties may be heard either in person, by counsel, or by other representatives as they may respectively elect, and the Board shall give reasonable notice of all hearings to all parties involved in any dispute submitted.

(k) The Board may summon any necessary witnesses and relevant non-confidential records of the Company and the employee involved.

(l) A majority vote of all members of the Board shall be competent to make a finding or a decision with respect to any dispute properly submitted to it, and such finding or decision shall be final and binding upon the parties to such dispute.

T (m) Upon failure of the Board to agree upon a finding or decision because of inability to secure a majority vote, the party who submitted the petition under paragraph (h) or (i) of this Article may elect in writing:

1. To immediately appeal or to withdraw the petition; or
2. To utilize a period up to sixty (60) calendar days to decide whether:
   A. To withdraw the petition; or
   B. To appeal the case to a five (5)-member Board.

If the petitioning party decides to appeal the case, it shall be submitted to an impartial person to be known as "Referee" who will sit with the Board as an additional member thereof in the further hearing and determination of the case.

Within five (5) work days after receipt of a written appeal, or the completion of the sixty (60) calendar-day period during which the case has not been withdrawn, the Vice President, Labor Relations or his designee for the Company and designated representative for the International Union shall forthwith proceed to select a "Referee" to sit with the Board. If the parties are unable to agree upon the selection of such additional member within fifteen (15) calendar days, they shall promptly request the National Mediation Board to submit a panel of seven (7) names from which the "Referee" will be selected, and when so named, the parties shall immediately arrange to schedule a date for a hearing to reach a determination of the dispute.

(n) Findings and decisions of the Board shall be stated in writing, and in each case a copy of the findings or decisions shall be furnished the Company, the Union and such employee or employees as are parties to the dispute. If a dispute arises as to the interpretation of the finding or decision, then upon request of the Company, the Union, or such employee or employees as are parties to the dispute, the Board shall interpret the finding or decision in the light of the facts stated as evidence presented in connection with its record and hearing of the case.

(o) The Board shall keep a complete and accurate record of all matters submitted for its consideration and of all findings and decisions made.

(p) All expenses of the Board, including those incurred by reason of the participation of a "Referee" in the determination of the controversy as herein provided, shall be borne one-half (1/2) by the Company and one-half (1/2) by the Union. The salary or compensation of the members of the Board, if any, shall be paid by the parties selecting such member or members; except that Field Board members who are employees of the Company shall be granted necessary leaves of absence without loss of pay to attend Board meetings. So far as space is available, Board members shall receive free transportation, subject to pay load, over the lines of the Company from point of duty to point of meeting and return for the purpose of attending meetings of the Board.

(q) It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner without fear that his individual relations with the Company or with the employees hereunder may be affected in any manner by any action by him in good faith in his capacity as a Board member. The parties hereto further mutually agree that each party shall and will specifically instruct each Board member selected that he shall at all times while serving in that capacity act not as a partisan or advocate of a partisan group or cause but shall act and serve solely to render impartial findings and just decisions.

(r) 1. Essential witnesses and representatives who are employees of the Company shall be furnished space

available transportation over the Company's lines without charge from the point of duty to the point of hearing and return, and such witnesses and representatives shall be granted leaves of absence without pay for a sufficient time to permit them to appear as such witnesses and representatives.

2. Witnesses and representatives who are not employees of the Company, who may be called by either party, shall be given space available transportation over the lines of the Company to the point of hearing and return subject to Governmental regulations.

This Agreement shall become effective as of May 1, 1954 and shall continue in full force and effect until September 1, 1955 and shall renew itself without change until September 1 of each succeeding year thereafter unless written notice of intended change is served by either party hereto in accordance with Section 6, Title 1, of the Railway Labor Act, as amended.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement, this 8th day of June, 1954.

PAN AMERICAN WORLD AIRWAYS, INC.

/s/ Everett M. Goulard
Director, Industrial Relations

TRANSPORT WORKERS UNION OF AMERICA, AFL/CIO

/s/ James F. Horst
International Vice President
Director, Air Transport Division

83-1952

Office Supreme Court, U.S
FILED
JUN 30 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PAN AMERICAN WORLD AIRWAYS, INC., APPELLANT,

v.

GEORGE FUCHERT, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

JAMES H. DANNENBERG
Deputy Attorney General
State of Hawaii
415 So. Beretania Street
Honolulu, HI 96813
Tel: (808) 548-4740
Counsel of Record

ROBYN M. MORIMOTO
Deputy Attorney General
Dept. of Labor and Industrial Relations
830 Punchbowl Street, Room 317
Honolulu, HI 96813
Tel: (808) 548-4372
Attorney for Appellee Agsalud

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL	5
I. THE COMPLAINT AGAINST APPELLANT ALLEGING UNLAWFUL DISCHARGE CANNOT BE CHARACTERIZED AS A MINOR DISPUTE SUBJECT TO THE COMPULSORY ARBITRATION UNDER THE RAILWAY LABOR ACT	6
A. A COMPLAINT GROUNDED IN A STATUTORY RIGHT IS NOT A MINOR DISPUTE	6
II. THE STATE COURT HAS JURISDICTION TO ENFORCE A PURELY STATUTORY CLAIM WHERE SUCH A CLAIM IS NOT A MINOR DISPUTE	20
CONCLUSION	24

TABLE OF AUTHORITIES

	Page
Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. 1980)	15, 19, 23
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1973)	8, 10, 11, 14, 15, 23
Andrews v. Louisville & N.R.R. 406 U.S. 320 (1972)	5, 6, 10
Andrews v. United States, 373 U.S. 334 (1963)	2
Barrentine v. Arkansas Best Freight System, 450 U.S. 728 (1980)	8, 11, 12, 14, 23
Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369 reh. denied 394 U.S. 1024 (1969)	9
Choate v. Louisville & N.R.R., 715 F.3d 369 (7th Cir. 1983)	16
Conrad v. Delta Airlines, Inc., 494 F.2d 914 (7th Cir. 1974)	20
Dorsey v. Chesapeake v. Ohio, R., 476 F.ed 243 (4th Cir. 1973)	18
Elgin, J. & E.R. v. Burley, 325 U.S. 711 (1944) affirmed 327 U.S. 661 (1946)	7, 8

Hendley v. Central of Georgia R.R., 609 F.2d 1146 cert. denied 449 U.S. 1093 (1981) 19

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983) 16

Jezierney v. Biggins, 56 Haw. 662, 548 P.2d 251 mtn. denied 57 Haw. 82, 549 P.2d 739 (19) 2

Kaschak v. Consolidated Rail Corp. 707 F.2d 902 (6th Cir. 1983) 17

Landfried v. Terminal R.R. Ass'n., 721 F.2d 254 (8th Cir. 1982) 19

McDonald v. City of West Branch, ___ U.S. ___, 104 S.Ct. 1799 (April 18, 1984) 8

Machinists v. Central Airlines 372 U.S. 682 (1963) 10

Magnuson v. Burlington Northern, Inc., 576 F.2d 1369 (9th Cir.) cert. denied 439 U.S. 930 (1978) 17

New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) 20, 21

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 21, 23

Perry Educatioan Ass'n v. Perry, Local Educators Ass'n, ___ U.S. ___, 103 S.Ct. 948 (1983) 2

Radar v. United Transportation Union, 718 F.2d 1012 (11th Cir. 1983) 17

Railroad Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50 (1944) 9

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 21

Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir. 1983) 17

Slocum v. Delaware, L. & W.R.R. 339 U.S. 239 (1950) 23

Stanton v. Delta Airlines, Inc., 669 F.2d 833 (1st Cir. 1982) 17

Steele v. Louisville N.R., 323 U.S. 192 (1944) 9

United Steelworkers of America v. Enterprise Wheel, 363 U.S. 593 (1960) 15, 23

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PAN AMERICAN WORLD AIRWAYS, INC., APPELLANT,

v.

GEORGE PUCHERT, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

Appellee Joshua C. Agsalud, Director of the Department of Labor and Industrial Relations, State of Hawaii, respectfully moves, pursuant to Supreme Court Rule 16, to dismiss or affirm the decision of the Hawaii Supreme Court.

JURISDICTION

Appellee disagrees with Appellant Pan American World Airways, Inc.'s assertion of jurisdiction pursuant to 28 U.S.C. § 1254(2) where the state statute

involved has not been struck down by a court of appeals as repugnant to the Constitution, treaties, or laws of the United States. Perry Education Association v. Perry Local Educators Association, ____ U.S. ____, 103 S. Ct. 948 (1983).

Moreover, the Supreme Court by statute only has jurisdiction over final judgments or decrees rendered by state courts. 28 U.S.C. § 1257 (1966) See Andrews v. United States, 373 U.S. 334, 340 (1963); 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3908 ( ). The Hawaii Supreme Court decision of January 27, 1984 remanded this case for a hearing on the merits; thus, said decision is not a final judgment. See Jezierny v. Biggins, 56 Haw. 662, 548 P.2d 251 mtn denied 57 Haw. 82, 549 P.2d 739 (19) Appellant has not alleged any circumstances which dictate against

the application of the final judgment rule in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The jurisdictional statement and accompanying appendix set forth the constitutional and statutory provision involved. They will not be repeated.

QUESTIONS PRESENTED

1. Whether a complaint against an airline alleging unlawful discharge based on a state statutory right not synonymous with any right under a collective-bargaining agreement constitutes a minor dispute subject to compulsory arbitration under the Railway Labor Act.

2. Whether the state court has jurisdiction to enforce a claim under a state statute regulating unlawful discharges where such claim is not a minor dispute.

STATEMENT OF THE CASE

Appellee basically agrees with the procedural history and statement of facts set forth in Appellant's jurisdictional statement, however, Appellee disagrees with Appellant's characterization of this case.

This case involves a state's right to provide a forum for its citizens in which they can enforce their statutory right not to be discharged solely because they have incurred an injury compensable under Hawaii's workers' compensation law. The statutory provision in this case is particularly non-intrunsive in the federal scheme under the Railway Labor Act to provide one forum for resolution of minor disputes, i.e., disputes arising under a collective bargaining agreement, because Hawaii's statute specifically provides that the statutory provision involved does not apply to any employer "who is a party to a

collective bargaining agreement which prèvents the continued employment or re-employment of the injured employee." Hawaii Revised Statutes (HRS) § 378-32(2) (1976).

QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The decision of the Hawaii Supreme Court rests upon the proposition that the claim involved did not constitute a minor dispute as it is grounded upon a state statutory right; a right not synonymous with any right provided under the then current collective-bargaining agreement between Appellant and the Transport Workers Union of America. See Andrews v. Louisville N.R.R., 406 U.S. 320, 324 (1972). Neither the Railway Labor Act nor case law mandate the conclusion that the Adjustment Board has exclusive jurisdiction over the claim in this case.

I. THE COMPLAINT AGAINST APPELLANT ALLEGING UNLAWFUL DISCHARGE CANNOT BE CHARACTERIZED AS A MINOR DISPUTE SUBJECT TO COMPULSORY ARBITRATION UNDER THE RAILWAY LABOR ACT.

Appellant has in its jurisdictional statement outlined the legislative and precedential history of the Railway Labor Act, which compelled the conclusion reached by this Court that submittal of disputes to the Adjustment Board is compulsory rather than optional where petitioner's only source of right was "conceded by all" to spring from "the collective-bargaining agreement between the employer and the union." Andrews, 406 U.S. at 324.

Appellee does not seek to challenge the validity of Andrews; rather Appellee seeks to demonstrate that the holding in Andrews is not applicable in this case.

A. A COMPLAINT GROUNDED IN A STATUTORY RIGHT IS NOT A MINOR DISPUTE

The basic disagreement between Appellant and Appellee revolves around

whether the claim in this case constitutes a minor dispute.

Appellant points to the expansive language in Elgin, J. & E.R. v. Burley, 325 U.S. 711 (1945) for the proposition that minor disputes consist of any dispute arising out of the union-represented employee employer relationship "even if such matters are not covered by the agreements." Appellant's Jursidictional Statement at 14. Appellant's averment appears necessary for its case since the collective bargaining agreement is silent on the issue of discharge solely because an employee suffered a work injury cognizable under the state's workers' compensation law. See appendix to Appellant's jurisdictional statement, Exhibit A-76.

Appellee disagrees with Appellant's contention for two reasons. First, while

the language in Elgin is admittedly broad, the dispute in the case revolved around a specific provision of the agreement: "Both collective and individual interests may be concerned in settlement where, as in this case, the dispute concerns all members alike, and settlement hangs exclusively upon a single common issue or cause of dispute arising from the terms of a collective agreement." Elgin, 325 U.S. at 737 (emphasis added). Second, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and subsequent cases have acknowledged a distinction between a contractual claim and a statutory claim. MacDonald v. City of West Branch, ___ U.S. ____, 104 SCt. 1799 (April 18, 1984); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981).

Appellant objects to the use of National Labor Relations Act cases in this

case dealing with the Railway Labor Act; however, while this Court has warned against wholesale importation of the provisions of the NLRA into the Railway Labor Act, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 reh. denied 394 US 1024 (1969), "The Court has in the past referred the NLRA for assistance in construing the Railway Labor Act, see, e.g. Steele v. Louisville & N.R. Co., 323 US 192, 200-201, 81 LEd 173, 181, 182, 65 SCt 226 (1944); Railroad Trainmen v. Toledo, P. & W.R. Co., 321 US 50, 61, n. 18, 88 LEd 534, 541, 64 SCt 413, 150 ALR 810 (1944)." 394 U.S. at 383. This is particularly true when the general principles to be considered are capable of consistent application.

In this case, where the issue turns upon the distinction between contractual and statutory rights, it seems especially

appropriate to look to NLRA precedent to aid in the determination of what type of rights a collective bargaining agreement would encompass. "(A)n agreement required under sec. 204 of the Railway Labor Act was said to be 'like the Labor Management Relations Act sec. 301 contract ... a federal contract and ... governed and enforceable by federal law, in federal courts.'" Andrews v. Louisville & N.R.R., 406 U.S. at 323 quoting Machinists v. Central Airlines, 372 U.S. 682, 692 (1963).

In Gardner-Denver, this Court declared that statutory rights afforded individuals pursuant to Tile VII are separate and distinct from contractual rights afforded union members under their collective-bargaining agreement.

The distinctly separate nature of the rights is not vitiated "merely because both [are] violated as a result of the same

factual occurrence." Gardner-Denver, 415 U.S. at 49-50.

The decision was based on the finding that "in enacting Title VII, Congress had granted individual employees a non-waivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the 'mojoitarian process' of collective bargaining." Barrentine, 450 U.S. at 737-38, quoting Gardner-Denver, 415 U.S. at 51. Moreover, the Gardner-Denver Court found that the contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights since the arbitrator's task is to "interpret and apply [the collective-bargaining] agreement in accordance with the 'industrial common law of shop' and the various needs and desires of the parties," and he "has no general authority to invoke

public laws that conflict with the bargain between the parties." Id. at 53.

Similarly, the Barrentine Court acknowledged a distinction between wage claim actions pursuant to a collective bargaining agreement and pursuant to the minimum wage provisions of the Fair Labor Standards Act, noting that "While courts should defer to arbitral decisions where the employee's claim is based on rights arising out of the collective bargaining agreements, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." 450 US at 737.

In this case, the State in enacting the statute involved was interested in providing individuals protection against discharges in this specific situation. The employment rights of employees in the State

of Hawaii first became a legislative concern in 1963. Hawaii's reformed workers' compensation Act included a provision designed as HRS § 97-135 which made it unlawful to discharge an employee solely because he incurred a work injury compensable under the Act, unless the employee was no longer capable of performing available jobs. Hawaii Revised Statute § 97-135 was later redesignated as HRS § 386-141 and administered by the workers' compensation division. Subsequently, concerned with effective enforcement against unlawful employment practices, the legislature repealed HRS § 386-141, enacted HRS § 378-32 the current statutory provision, and transferred the enforcement function to the Division of Labor Law Enforcement, Department of Labor, State of Hawaii whose primary function is investigation of labor law violations.

It is clear from the history of Hawaii's statute that the state was and is concerned with insuring that its citizens' rights to workers' compensation benefits are not frustrated. In furtherance of this objective the state, after some experimentation, has located the agency best suited for enforcing this statutory provision and entrusted the agency with such authority.

Appellant has not pointed to any provision in the collective bargaining agreement which would afford the individual the same right secured by statute. Thus, the argument that the contractual and statutory rights involved here are separate and distinct is stronger here than in Gardner-Denver and Barrentine, where the collective agreements did at least to a limited extent provide the employees

protection similar to that provided by statute.

Moreover, since the agreement doesn't contain any provisions as to the impropriety of discharging an employee solely because he has a compensable workers' compensation claim, it is unlikely that the Adjustment Board as arbitrator would have authority to resolve the claim. See United Steelworkers of America v. Enterprise Wheel, 363 U.S. 593 (1960); Gardner-Denver, supra; Air Line Pilots Association v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. 1980).

Appellant has not suggested that the Adjustment Board's arbitral powers are any greater than those of arbitrators in general.

Thus, the purely statutory right, a claim not recognized by the collective-bargaining agreement, cannot be

characterized as a minor dispute, for to do so would be to require its submissal to a Board that has no authority to enforce the claim.

The lower federal court cases cited by Appellant do not indicate a trend to interpret Andrews to apply to purely statutory causes of action. None of the cases concluded that purely statutory rights must be submitted to the Adjustment Board. The claims in the following cases were based either on contract or common law: Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1049 (7th Cir) (Claimant's "right not to be discharged at will of conrail grows out of collective bargaining agreement."); Choate v. Louisville & N.R.R.. 715 F.2d 369, 371 (7th Cir 1983) (Characterizing defendant's conduct as improper "implies the existence of

contractual standards."); Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir 1983) (involved interpretation of seniority rights provision in contract); Radar v. United Transportation Lines, 718 F.2d 1012, 1013 (11th Cir 1983) (interpretation of "collective bargaining agreement regarding seniority rights"); Stanton v. Delta Airlines, Inc., 669 F.2d 833, 837 (1st Cir 1981) subject matter of grievance involved "the meaning of terms in the contract"); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 cert. denied 439 U.S. 930 (9th Cir 1978) (only claim asserted was common law tort of emotional distress).

Additionally, Kaschak v. Consolidated Rail Corp., 707 F.2d 902 (6th Cir 1983), the Court decided not to foreclose resort to the courts to a claimant if upon remand the claimant could

show that he reasonably relied upon his union to advance his claim through the grievance procedures of the union breached its duty.

The court's decision in Dorsey v. Chesapeake & Ohio Railway, 476 F.2d 243, did not rest on a determination, as asserted by Appellant, that even Constitutional claim must also be referred to the Adjustment Board. Rather, the court in Dorsey noting that the constitutional violations asserted by the claimant occurred during the initial hearing by the employer on railroad property, stated "The federal courts are not guarrantors of any rights of either labor or management at the initial hearing either by force of the constitution or Railway Labor Act."

Thus, all that the above cases demonstrate is that where a claimant is unable to assert a right other than one

involving the interpretation of the collective-bargaining contract or resting on a common law tort, the dispute is minor and should be submitted to the Adjustment Board.

In contrast, the court in Landfried v. Termal RR Association, 721 F.2d 254, 256 (8th Cir 1982), stated that its decision in favor of the Board's jurisdiction may have been different if "plaintiff could show that their discharge constitutes the violation of a specific federal statutory section." See Hendley v. Central of Georgia Railroad, 609 F.2d 1146 cert. denied 449 US 1093 (1981) (5th Cir 1980).

Similarly, the court in Air Line Pilots Association, supra, stated that "The Railway Labor Act's arbitral provisions do not demand that such pure statutory, non-contractual claims be sent to arbitration, they can go directly to

court." 627 F.2d at 277. See Conrad v. Delta Air Lines, Inc., 494 F.2d 914 (7th Cir 1974) (Charge based on violation of provision of the Railway Act not committed to exclusive jurisdiction but is within jurisdiction of district court).

Thus, there is no developing body of case law supporting Appellant's position, rather the opposite.

II. THE STATE COURT HAS JURISDICTION TO ENFORCE A PURELY STATUTORY CLAIM WHERE SUCH A CLAIM IS NOT A MINOR DISPUTE.

The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on the permissible scope of state regulation of activity touching upon labor management relations. New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519, 527 (1979).

With respect to laws deeply rooted in local feeling and responsibility, this

Court has stated, "that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." New York Telephone, 440 U.S. at 539-40 quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

"Workmen's compensation is pre-eminently a matter of state concern. Cf. New York Telephone Co., supra, 440 U.S. at 533-39, 99 S.Ct. at 1337-1340, (state unemployment compensation statutes should be treated with the same deference afforded other state laws protecting interests deeply rooted in local feeling and responsibilty.)" Peabody Galion v. Dollar, 666 F.2d 1309 (9th Cir. 1981).

In this case, it appears that Appellant is not attacking the state's power to enact a statute making it unlawful to discharge an employee solely because he

has a compensable injury but rather challenging the state's power to afford the employee a forum in which such right could be enforced.

Appellee contends that in this case there is no "compelling congressional direction" from which it can be inferred that Congress deprived the State of the power to act.

Resort to the Adjustment Board for minor disputes was thought to be both effective and desirable because the Board was "well equipped to exercise its congressionally imposed functions. Its members understood railroad problems and speak the railroad jargon. Long varied experiences have added to the Board's initial qualifications. Precedents established by it while not necessarily binding, provide opportunities for a desirable degree of uniformity in the

interpretation of agreements throughout the nation's railway systems." Slocum v. Delaware, L. & W.R.R., 339 U.S. 239, 243 (1950).

The attributes which recommend the Board as an ideal forum for disposing of disputes which arise under collective bargaining agreements do not compel the same conclusion where the dispute arises from a statutory right which is not recognized by the collective-bargaining agreement. See Gardner-Denver, 415 U.S. at 53; Barrentine, 450 U.S. at 737. "It is fundamental that an individual cannot be compelled to arbitrate a dispute which he did not contract to arbitrate." Peabody, 666 F.2d at 1320. United Steelworkers of America v. Enterprise Wheel, supra, Air Line Pilots Association v. Northwest Airlines, 627 F.2d at 277.

Consequently, it is inconceivable to imply a congressional intent to require that a purely statutory claim, resulting from legislation deeply rooted in local concern be addressed and resolved by an Adjustment Board which is not equipped to consider such claim where the collective bargaining agreement is silent on the subject.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends are so unsubstantial as to not need further argument.

Respectfully submitted,

JAMES H. DANNENBERG
Deputy Attorney General
Attorney for Appellee Joshua C. Agsalud, Director of the Department of Labor and Industrial Relations, State of Hawaii